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No.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT
TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington;
CHRISTINE O. GREGOIRE, Attorney General of the State
of Washington; BARBARA J. HERMAN, Administrator
of the State of Washington Office of Marine Safety;
DAVID MACEACHERN, Prosecutor of Whatcom County;
K. CARL LONG, Prosecutor of Skagit County; JAMES H.
KRIDER, Prosecutor of Snohomish County; NORMAN
MALENG, Prosecutor of King County; NATURAL RESOURCES
DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL
COUNCIL and OCEAN ADVOCATES,

Respondents.

*On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit*

APPENDIX

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**APPENDIX A — ORDER AND AMENDED OPINION
OF THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT DATED AND FILED JUNE 18,
1998 AND AMENDED AUGUST 31, 1998**

**FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE INTERNATIONAL ASSOCIATION OF
INDEPENDENT TANKER OWNERS
(INTERTANKO),

Plaintiff-Appellant,
and

UNITED STATES OF AMERICA,
Intervenor-Appellant,
v.

GARY LOCKE, Governor of the
State of Washington; CHRISTINE O.
GREGOIRE, Attorney General of the
State of Washington; BARBARA J.
HERMAN, Administrator of the
State of Washington Office of
Marine Safety; DAVID
MACEACHERN, Prosecutor of
Whatcom County; K. CARL LONG,
Prosecutor of Skagit County;
JAMES H. KRIDER, Prosecutor of
Snohomish County; NORMAN
MALENG, Prosecutor of King
County,

Defendants-Appellees,
and

NATURAL RESOURCES DEFENSE
COUNCIL; WASHINGTON
ENVIRONMENTAL COUNCIL; OCEAN
ADVOCATES,

Intervenors-Appellees.

No. 97-35010

D.C. No.
CV-95-1096 JCC

**ORDER AND
AMENDED
OPINION**

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Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
February 4, 1998—Seattle, Washington

Filed June 18, 1998
Amended August 31, 1998

Before: James R. Browning and Diarmuid F. O'Scannlain,
Circuit Judges, and Alfredo C. Marquez,* District Judge.

Opinion by Judge O'Scannlain

SUMMARY

Admiralty and Marine

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that the federal Ports and Waterways Safety Act (PWSA) preempts a state regulation requiring oil tankers to have specific types of navigation equipment on board while operating in the state's territorial waters.

The State of Washington enacted laws requiring all tankers transporting oil in state waters to file oil-spill prevention plans with the State, and to comply with the State's Best Achievable Protection (BAP) regulations. Appellant International Association of Independent Tanker Owners (Intertanko) objected, asserting that 16 of the regulations were unconstitutional. Intertanko brought a federal action for declaratory and

*The Honorable Alfredo C. Marquez, Senior Judge, United States District Court for the District of Arizona, sitting by designation.

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injunctive relief, alleging that regulations on tanker manning, training, management, safety, and onboard equipment were preempted by the PWSA and other federal statutes.

The district court granted summary judgment for the State, upholding all of the challenged regulations. Intertanko appealed.

The State maintained that Congress indicated its intent not to preempt state law in the field of oil-spill prevention in the savings clause of § 1018 of the Oil Pollution Act of 1990 (OPA 90). Intertanko countered that § 1018 is limited in its application to state laws concerning liability and penalties, the subjects covered by Title I of OPA 90, where § 1018 is located.

[1] By its plain language, § 1018 applies not only to Title I, but to the other eight titles of OPA 90 as well. Because the oil-spill prevention requirements set forth in the BAP regulations clearly “respect” the discharge of oil, they are not preempted by anything in OPA 90.

[2] However, OPA 90 is not the only federal statute that regulates tanker vessels. [3] The plain language of § 1018 could not bear the interpretation that the savings clause of § 1018 applies not only to OPA 90, but to the other federal tanker-regulation statutes as well. Section 1018 does not explicitly address whether state oil-spill prevention rules may be preempted by federal acts other than OPA 90. [4] Although OPA 90 amended prior federal statutes, § 1018 by its plain language has no automatic impact on preemption caused by those statutes.

[5] The Supreme Court has recognized three types of preemption: conflict preemption, field preemption, and express preemption. Conflict preemption occurs when compliance with both state and federal law is impossible, or the state law stands as an obstacle to the accomplishment and execution of

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the full purposes and objectives of Congress. Field preemption exists when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it. Express preemption exists when Congress explicitly states its intent to displace state law in the statute's language.

[6] In the field of tanker regulation, the overarching purposes of Congress are best revealed by OPA 90. As the most recent federal statute in the field, OPA 90 reflects the full purposes and objectives of Congress. [7] The enactment of a new federal statute in a particular legislative field may influence whether state laws in that field frustrate the full purposes and objectives of Congress. This is true even if the new statute contains a non-preemption clause that does not address other statutes in the field, or does not contain a non-preemption clause at all. Section 1018 demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability, and compensation.

[8] States have no power to override international agreements entered into by the federal government. [9] Passage of OPA 90 by Congress reinforced the conclusion that strict international uniformity with respect to the regulation of tankers is not mandated by federal law, and that international agreements set only minimum standards. To reach any other conclusion, § 1018 would have to be read to provide that the act permits state tanker regulation only when the field in question is not subject to international regulation. However, § 1018 plainly states that nothing in the act will be interpreted to prohibit states from imposing any additional liability or requirements.

[10] Unlike design and construction requirements, operating rules are not automatically subject to field preemption by the PWSA. [11] Virtually all of the challenged BAP regulations impose operational requirements rather than design and

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construction requirements. They are not automatically subject to field preemption.

[12] However, the navigation equipment requirements imposed in Wash. Admin. Code § 317-21-265 are virtually indistinguishable from the radar and navigation devices that the Supreme Court found to be regulated preemptively by the PWSA. Wash. Admin. Code § 317-21-265 is impliedly preempted by the PWSA.

[13] Once a court has determined that state tanker regulations are not subject to implied preemption as design and construction requirements, the court must examine whether the state regulations are expressly preempted. [14] Acting through its rulemaking process, a federal agency can effect preemption of state law. [15] Preemption does not occur if the federal agency is acting beyond the scope of its delegated powers.

[16] When it passed OPA 90, Congress required the Coast Guard to implement a wide range of oil-spill prevention rules. Section 1018 establishes that nothing in OPA 90 may be construed as impairing the ability of the states to impose their own oil-spill prevention requirements. The Coast Guard was not acting within the scope of its congressionally delegated authority in enacting regulations that purported to preempt state law.

[17] The Supreme Court has distinguished between two types of impermissible state regulations that incidentally burden interstate commerce. A facially nondiscriminatory regulation supported by a legitimate state interest is constitutional unless the burden on interstate commerce is clearly excessive in relation to the local benefits. However, when a regulation clearly discriminates against interstate commerce, it violates the Commerce Clause unless the discrimination is demonstrably justified by a valid factor unrelated to state protectionism.

[18] Intertanko failed to point to any evidence to establish that the cost for a tanker operator to develop an oil-spill pre-

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vention plan was clearly excessive in relation to the putative local benefits. Nor did Intertanko argue that the BAP regulations discriminate in favor of in-state interests. Intertanko's contention that the regulations violated the Commerce Clause was therefore without merit.

[19] The Constitution entrusts the administration of foreign affairs to the President and Congress. Any state law that involves the state in the actual conduct of foreign affairs is unconstitutional. [20] By their terms, the BAP regulations apply only to vessels operating within Washington's territorial limits. Intertanko failed to demonstrate that, even if the regulations had some extraterritorial impact, that impact was more than incidental or indirect. The BAP regulations do not infringe on the foreign affairs power of the federal government.

COUNSEL

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ORDER

The panel's opinion, filed on June 18, 1998, is amended as follows:

At Slip. Op. p. 6105, line 25:

Replace "NATIONAL RESOURCE DEFENSE COUNCIL;"

with "NATURAL RESOURCES DEFENSE COUNCIL;"

At Slip. Op. p. 6111, line 5:

Replace "National Resource Defense Council,"

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with "Natural Resources Defense Council,"

At Slip. Op. p. 6115, second full paragraph, lines 4-8:

Replace "Three environmental organizations — the Washington Environmental Council, the National Resources Defense Council, and Ocean Advocates — later intervened on behalf of the state defendants, while the United States intervened on behalf of Intertanko."

with "Three environmental organizations — the Washington Environmental Council, the Natural Resources Defense Council, and Ocean Advocates — have intervened on behalf of the state defendants, while the United States has intervened on behalf of Intertanko."

At Slip. Op. p. 6129, line 30:

Insert the following footnote after "*Ray*."

"Intertanko asks us to rule that *Ray*'s holding does not apply to 'on-board' operating rules. However, the relevant passage from *Ray* plainly refers to 'operating rule[s],' *Ray*, 435 U.S. at 171, not merely 'off-board operating rules.' Contrary to what Intertanko's argument implies, we are not at liberty to limit a holding of the United States Supreme Court to its facts."

At Slip. Op. p. 6135, lines 28-29:

Replace "However, Congress did not authorize the Coast Guard to preempt state law."

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with “However, Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law.”

At Slip. Op. p. 6135, footnote 14, lines 4-8:

Replace “Accordingly, we hold that the Coast Guard impermissibly acts beyond its ‘congressionally delegated authority,’ *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 374, not only when it purports to preempt state oil-spill prevention laws under the authority of OPA 90, but also when it purports to do so under the authority of other federal statutes.”

with “Accordingly, we hold that the operational requirements imposed by the BAP Regulations are not preempted by *any* federal regulations.”

At Slip. Op. p. 6135, line 32:

Insert the following text after “§ 2718.”:

“In view of Congress’s unwillingness to preempt state oil-spill prevention efforts on its own, we find implausible the argument that it intended to delegate power to the Coast Guard to do so.”

OPINION

O’SANNLAIN, Circuit Judge:

We must decide whether Washington’s Best Achievable Protection Regulations, which impose requirements on oil

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tankers to prevent oil spills, are preempted by comparable federal legislation under the Supremacy Clause or otherwise violate the United States Constitution.

I

In the aftermath of the Exxon Valdez oil spill in 1989, the State of Washington enacted laws to protect its waters from pollution by oil tankers. *See* Wash. Rev. Code §§ 88.46.010, *et seq.*; Wash. Admin. Code §§ 317-21-010, *et seq.* These provisions require that, in order to transport oil in state waters, tanker operators must: (1) file oil-spill prevention plans with the state, and (2) comply with the state's Best Achievable Protection ("BAP") Regulations, which are promulgated by the Washington Office of Marine Safety. *See* Wash. Rev. Code § 88.46.040. The International Association of Independent Tanker Owners ("Intertanko") maintains that sixteen of these regulations are unconstitutional. The district court summarized the challenged regulations as follows:

1. Event Reporting — WAC 317-21-130. Requires operators to report all events such as collisions, allisions and near-miss incidents for the five years preceding filing of a prevention plan, and all events that occur thereafter for tankers that operate in Puget Sound.
2. Operating Procedures — Watch Practices — [WAC 317-21-200].¹ Requires tankers to employ specific watch and lookout practices while navigating and when at anchor, and requires a bridge resource management system that is the "standard practice throughout the owner's or operator's fleet," and which organizes responsibilities and coordinates communication between members of the bridge.

¹The district court misidentified this regulation as "WAC 317-21-130." *International Association of Independent Tanker Owners (Intertanko) v. Lowry*, 947 F. Supp. 1484, 1488 (W.D. Wa. 1996).

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3. Operating Procedures — Navigation — WAC 317-21-205. Requires tankers in navigation in state waters to record positions every fifteen minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way.
4. Operating Procedures — Engineering — WAC 317-21-210. Requires tankers in state waters to follow specified engineering and monitoring practices.
5. Operating Procedures — Prearrival Tests and Inspections — WAC 317-21-215. Requires tankers to undergo a number of tests and inspections of engineering, navigation and propulsion systems twelve hours or less before entering or getting underway in state waters.
6. Operating Procedures — Emergency Procedures — WAC 317-21-220. Requires tanker masters to post written crew assignments and procedures for a number of shipboard emergencies.
7. Operating Procedures — Events — WAC 317-21-225. Requires that when an event transpires in state waters, such as a collision, allision or near-miss incident, the operator is prohibited from erasing, discarding or altering the position plotting records and the comprehensive written voyage plan.
8. Personnel Policies — Training — WAC 317-21-230. Requires operators to provide a comprehensive training program for personnel that goes beyond that necessary to obtain a license or merchant marine document, and which includes instructions on a number of specific procedures.

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9. Personnel Policies — Illicit Drugs and Alcohol Use — WAC 317-21-235. Requires drug and alcohol testing and reporting.
10. Personnel Policies — Personnel Evaluation — WAC 317-21-240. Requires operators to monitor the fitness for duty of crew members, and requires operators to at least annually provide a job performance and safety evaluation for all crew members on vessels covered by a prevention plan who serve for more than six months in a year.
11. Personnel Policies — Work Hours — WAC 317-21-245. Sets limitations on the number of hours crew members may work.
12. Personnel Policies — Language — WAC 317-21-250. Requires all licensed deck officers and the vessel master to be proficient in English and to speak a language understood by subordinate officers and unlicensed crew. Also requires all written instruction to be printed in a language understood by the licensed officers and unlicensed crew.
13. Personnel Policies — Record Keeping — WAC 317-21-255. Requires operators to maintain training records for crew members assigned to vessels covered by a prevention plan.
14. Management — WAC 317-21-260. Requires operators to implement management practices that demonstrate active monitoring of vessel operations and maintenance, personnel training, development, and fitness, and technological improvements in navigation.
15. Technology — WAC 317-21-265. Requires tankers to be equipped with global positioning sys-

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tem receivers, two separate radar systems, and an emergency towing system.

16. Advance Notice of Entry and Safety Reports — WAC 317-21-540. Requires at least twenty-four hours notice prior to entry of a tanker into state waters, and requires that the notice report any conditions that pose a hazard to the vessel or the marine environment.

International Association of Independent Tanker Owners (Intertanko) v. Lowry, 947 F. Supp. 1484, 1488-89 (W.D. Wa. 1996) Failure to comply with the BAP Regulations subjects tanker owners to the following: (1) assessment of civil penalties, *see* Wash. Rev. Code § 88.46.090; (2) criminal prosecution, *see* Wash. Rev. Code § 88.46.080; and (3) denial of entry into state waters, *see* Wash. Admin. Code § 317-21-020.

Seeking both a declaration that the above-mentioned BAP Regulations are unconstitutional and a permanent injunction against their enforcement, Intertanko filed suit in federal district court.² Intertanko alleged that the requirements imposed by the regulations on tanker manning, training, management, safety, and on-board equipment were preempted by various federal statutes, including the Oil Pollution Act of 1990, the Port and Tanker Safety Act of 1978, the Ports and Waterways Safety Act of 1972, and the Tank Vessel Act of 1936. Intertanko also maintained that several of the BAP Regulations were preempted by Coast Guard regulations and by various international treaties. In addition to asserting that the BAP Regulations are invalid under the Supremacy Clause, Intertanko argued that the regulations violate the Commerce Clause and impermissibly infringe upon the foreign affairs power of the federal government.

²Intertanko named as defendants the Governor of Washington and various other state and local officials responsible for the promulgation and enforcement of the regulations.

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The district court granted the State's motion for summary judgment and upheld every one of the challenged regulations. *See Intertanko*, 947 F. Supp. at 1500-01. Intertanko filed a timely appeal. Three environmental organizations — the Washington Environmental Council, the Natural Resources Defense Council, and Ocean Advocates — have intervened on behalf of the state defendants, while the United States has intervened on behalf of Intertanko.

II

Intertanko's primary contention on appeal is that the BAP Regulations are preempted by federal law. Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Consideration of preemption issues "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, "[t]he purpose of Congress is the ultimate touchstone" of preemption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

The state defendants maintain that Congress expressly indicated its intent not to preempt state law in the field of oil-spill prevention when it passed § 1018 of the Oil Pollution Act of 1990 ("OPA 90"). *See* Pub. L. No. 101-380, 104 Stat. 484 (codified at 33 U.S.C. § 2701, *et seq.*). That provision states, in pertinent part:

(a) Preservation of State authorities . . . *Nothing in this Act³ or the Act of March 3, 1851 shall —*

³When OPA 90 was codified, all references to "Act" became "chapter."

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(1) *affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to —*

(A) *the discharge of oil or other pollution by oil within such State*

. . . .

(c) *Additional requirements and liabilities; penalties* Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et seq.) or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), *shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof —*

(1) *to impose additional liability or additional requirements; or*

(2) *to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;*

relating to the discharge, or substantial threat of a discharge, of oil.

33 U.S.C. § 2718 (a) (emphasis added).

The state defendants maintain that, by providing that nothing in OPA 90 preempts states from imposing "additional liability or requirements with respect to the discharge of oil or other pollution by oil," 33 U.S.C. § 2718(a); *see also* 33 U.S.C. § 2718(c), § 1018 grants states broad authority to enact oil-spill prevention regulations. In response, Intertanko argues that the savings clause of § 1018, which is located in Title I

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of OPA 90, applies only to that Title. Therefore, Intertanko asserts, § 1018 is limited in its application to state laws concerning liability and penalties, the subjects covered by Title I. Intertanko claims that the savings clause does *not* apply to the other eight Titles of OPA 90, including Title IV, which concerns oil-spill prevention.⁴ Therefore, Intertanko contends, the savings clause contained in Title I does not preclude the oil-spill prevention provisions included in Title IV from preempting the oil-spill prevention provisions included in the BAP Regulations. In support of this argument, Intertanko notes that § 1018's savings clause is located not in a preamble to OPA 90, but instead near the end of Title I. Intertanko further observes that the language of § 1018 is consistent with the subject matter of Title I, which concerns oil-spill liability and penalties, but inconsistent with the subject matter of Title IV, which concerns oil-spill prevention.⁵

[1] Intertanko's argument that § 1018's savings clause applies only to Title I is at odds with that clause's plain language. Section 1018(a) provides that "[n]othing in this Act" preempts states from "imposing any . . . requirements with respect to the discharge of oil or other pollution by oil." 33 U.S.C. 2718(a) (emphasis added). By its plain language, § 1018 applies not only to Title I but to the other eight Titles of OPA 90 as well. Accordingly, because the oil-spill prevention requirements set forth in the BAP Regulations clearly

⁴OPA 90 contains nine Titles. These include: Title I, Oil Pollution Liability and Compensation; Title II, Conforming Amendments; Title III, International Oil Pollution Prevention and Removal; Title IV, Prevention and Removal; Title V, Prince William Sound Provisions; Title VI, Miscellaneous Provisions; Title VII, Oil Pollution Research and Development Program; Title VIII, Trans-Alaska Pipeline System; and Title IX, Oil Spill Fund Transfers. See 33 U.S.C. § 2701, *et. seq.*

⁵Intertanko also points out that Title I of OPA 90 is labeled "Liability and Compensation." However, § 6001(c) of OPA 90 states that "[a]n inference of legislative construction shall not be drawn by reason of the caption or catch line of a provision enacted by this Act." 33 U.S.C. § 2751(c).

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"respect"⁶ the discharge of oil, they are not preempted by anything in OPA 90.

III

[2] OPA 90 is not the only federal statute that regulates tanker vessels, however. Other such statutes include the Port and Tanker Safety Act of 1978 ("PTSA"), *see* Pub. L. No. 95-474, 92 Stat. 471, the Ports and Waterways Safety Act of 1972 ("PWSA"), *see* Pub. L. No. 92-340, 86 Stat. 424, and the Tank Vessel Act of 1936, *see* Pub. L. No. 74-765, 49 Stat. 1889. The United States contends that even if OPA 90 does not preempt the challenged BAP Regulations because of the savings clause in § 1018, these other federal statutes do.

[3] In response, the state defendants maintain that, by its plain language, the savings clause of § 1018 applies not only to OPA 90 but to the other federal tanker regulation statutes as well. The plain language of § 1018 cannot bear this interpretation. Section 1018 says that nothing "in this Act"⁷ pre-

⁶Like the phrase "relating to" employed in § 1018(c), the phrase "with respect to" used in § 1018(a) is "clearly expansive." *De Buono v. NYSA-ILSA Medical & Clinical Servs. Fund*, 117 S. Ct. 1747, 1751 (1997) (discussing "relate to" language of Employee Retirement Income Security Act of 1974). However, we decline to read § 1018's language "according to its terms . . . since, as many a curbstone philosopher has observed, everything is related to everything else." *California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A.*, 117 S. Ct. 832, 843 (Scalia, J., concurring). Rather, in determining whether state oil-spill prevention laws "respect" or "relate to" the "discharge of oil," we must look to the "objectives" of OPA 90. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.*, 514 U.S. 645, 655-56 (1995) (in determining scope of clause preempting "all state laws insofar as they . . . relate to any employee benefit plan," courts must "look to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive") (emphasis added). Because one of the explicit "objectives" of OPA 90 is oil-spill prevention, *see* OPA 90 §§ 2701-2718 (Title IV — Oil Spill Prevention), § 1018 prevents anything in OPA 90 from preempting state laws in this field.

⁷Section 1018 refers to "the Act of March 3, 1851" as well as "this Act." The 1851 Act is a limitation of liability statute that permits a party

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empt state authority to impose additional requirements. *See* 33 U.S.C. § 2718(a), (c). Thus, § 1018 does not explicitly address whether state oil-spill prevention rules may be preempted by federal "Acts" *other than* OPA 90.

[4] The state defendants also contend that, because OPA 90 amends the PWSA, the PTSA, and the Tank Vessel Act, the savings clause of § 1018 need not expressly refer to those Acts to prevent them from preempting state law. However, the state defendants do not, and could not, offer any authority for the proposition that a savings clause in an Act that amends another Act *necessarily* applies to the amended Act, even when the savings clause expressly refers to "*this* Act." Although OPA 90 amended prior federal statutes, § 1018 by its plain language has no automatic impact on preemption caused by those statutes.

IV

[5] Because § 1018 of OPA 90 does not by its plain language affect preemption by federal Acts other than OPA 90, we must determine whether such Acts otherwise impliedly or expressly preempt the BAP Regulations. The Supreme Court has recognized three types of preemption: conflict preemption, field preemption, and express preemption.⁸ *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Conflict preemption occurs "when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989) (citations omit-

to enjoin all pending suits and to compel them to be filed in a special limitation proceeding. It is undisputed that the 1851 Act is not relevant to this appeal.

⁸As the Supreme Court observed in *English v. General Electric Co.*, 496 U.S. 72 (1990), these categories are not "rigidly distinct." *Id.* at 79 n.5.

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ted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Field preemption exists when federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Fed. Sav. & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 313 U.S. 218, 230 (1947)). Finally, express preemption exists when Congress explicitly states its intent to displace state law in the statute's language. See *Cipollone*, 505 U.S. at 516. The issues of conflict, field, and express preemption were all raised by Intertanko in district court and are raised again on appeal.

A

We first examine whether the BAP Regulations are subject to conflict preemption. Conflict preemption exists "when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California v. ARC America Corp.*, 490 U.S. at 100-01 (quoting *Hines*, 312 U.S. at 67). Intertanko does not argue that compliance with both federal law and the BAP Regulations is impossible; rather, Intertanko contends that the BAP Regulations interfere with "the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67.

1

Congress's first effort in the field of tanker regulation was the Tank Vessel Act, passed in 1936. See Pub. L. No. 74-765, 49 Stat. 1889. The Tank Vessel Act "sought to effect a 'reasonable and uniform set of rules and regulations concerning ship construction . . .,'" *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 166 (1977) (quoting H.R. Rep. No. 74-2962, at 2 (1936)).

In 1972, the Tank Vessel Act was significantly expanded by the Ports and Waterways Safety Act ("PWSA"), see Pub.

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L. No. 92-340, 86 Stat. 424, which "subjects to federal rule the design and operating characteristics of oil tankers." *Ray*, 435 U.S. at 154. The PWSA contains two Titles. Title I is concerned with controlling tanker traffic. *See id.* at 161. Title I authorizes the Coast Guard to "specify[] the times for vessel movement, [to] establish[] size and speed limitations and vessel operating conditions, and [to] restrict[] vessel operation to those vessels having the particular operating characteristics which [it] considers necessary for safe operation under the circumstances." *Id.* at 169-70. Whereas Title I of the PWSA focuses on tanker traffic, Title II of the Act is concerned with tanker design, construction, and operation. As the Supreme Court explained in *Ray*, whereas Title I can be "compare[d] to 'providing safer surface highways and traffic controls for automobiles,' . . . Title II [may be] likened to 'providing safer automobiles to transit those highways.'" *Id.* at 161 n.9 (quoting S. Rep. No. 92-724, at 9-10 (1972), reprinted in 1972 U.S.C.C.A.N. 2766, 2769).

In 1978, the PWSA and Tank Vessel Act were supplemented by the Port and Tanker Safety Act ("PTSA"). *See* Pub. L. No. 95-474, 92 Stat. 1471. The PTSA requires the Secretary of Transportation to establish regulations addressing vessel management, drug and alcohol testing, seafarer training and qualifications, casualty reporting, seafarer discipline, manning, work hours, pilotage, and language requirements. *See* 46 U.S.C. §§ 9101, 9102.

The federal tanker regulation scheme was again substantially altered when Congress passed OPA 90. *See* Pub. L. No. 101-380, 104 Stat. 484. Enacted following the Exxon Valdez oil spill, OPA 90 addresses oil-pollution prevention, removal, liability, and compensation. *See* 33 U.S.C. § 2701, *et. seq.* OPA 90 imposed a number of new federal oil-spill prevention requirements, including: random drug and alcohol testing, *see* 46 U.S.C. § 7702; a provision mandating that working hours on a tanker be no more than 15 hours in any 24-hour period, or more than 36 hours in any 72-hour period, *see* 46 U.S.C.

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§ 8104(n); and a requirement that tankers be equipped with double hulls, *see* 46 U.S.C. § 3703a.

[6] Intertanko maintains that the BAP Regulations frustrate the purposes and objectives of Congress in adopting this legislative scheme. We disagree. In determining "the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67, we must look not to the purposes and objectives of any single Act, but instead to Congress's overarching purposes and objectives in the relevant legislative field. *See California v. ARC America Corp.*, 490 U.S. at 102 ("Appellees' only contention is that state laws permitting indirect purchaser recoveries pose an obstacle to the accomplishment of the purposes and objectives of Congress. State laws to this effect are consistent with the broad purposes of the *federal antitrust laws* . . .") (citing cases involving both Sherman Act and Clayton Act) (emphasis added). In the field of tanker regulation, the overarching purposes of Congress are best revealed by OPA 90. As the most recent federal statute in the field, OPA 90 reflects "the *full* purposes and objectives of Congress," *Hines*, 312 U.S. at 67 (emphasis added), better than the PWSA, the PTSA, or the Tank Vessel Act, all of which OPA 90 was designed to complement.

[7] As explained above, § 1018 of OPA 90 does not *expressly* apply to other federal "Acts." However, the enactment of a new federal statute in a particular legislative field may influence whether state laws in that field "frustrate the *full* purposes and objective of Congress." *Hines*, 312 U.S. at 67 (emphasis added). This is true even if the new statute contains a non-preemption clause which does not address other statutes in the field, *cf. Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (existence of statutory provision containing "express definition of the pre-emptive reach of a statute . . . does not mean that the express clause entirely forecloses any possibility of implied pre-emption"), or does not contain a non-preemption clause at all, *see California v. ARC America Corp.*, 490 U.S. at 102. Section 1018 of OPA 90 sheds con-

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siderable light upon the purposes and objectives of Congress in effectuating a federal scheme of tanker regulation. That provision demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability, and compensation. Accordingly, we decline Intertanko's invitation to strike down the challenged BAP Regulations in their entirety on the ground that they frustrate Congress's purposes and objectives in enacting OPA 90, the PWSA, the PTSA, and the Tanker Safety Act.

2

Intertanko next contends that the BAP Regulations frustrate the purposes and objectives of Congress because they conflict with various international treaties. These treaties include: the International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47; the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 17 I.L.M. 546; the Multilateral International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459; the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, Dec. 19, 1979, 32 U.S.T. 377; and the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261.⁹

[8] As the Supreme Court observed in *Hines*, in determining whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . it is of importance that [the state] legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." *Hines*, 312 U.S. at 67-68. States have no power to override international agreements entered into by the federal government. See *Zschemig v. Miller*, 389 U.S. 429, 441 (1968).

⁹Despite being a signatory, the United States has not ratified the United Nations Convention on the Law of the Sea.

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Intertanko's argument that the BAP Regulations are preempted by these international treaties is undermined by our decision in *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984). In *Chevron*, we held that an Alaska statute that prohibited tankers from discharging ballast into the territorial waters of Alaska was not preempted by either federal statute or international agreement. *See Chevron*, 726 F.2d at 485. We stated:

[T]he PWSA/PTSA does not mandate strict international uniformity. Although the legislative history of the PWSA/PTSA refers to congressional intent to abide by international agreements regarding the regulation of tankers, the statute nonetheless gives the Coast Guard specific authority to establish stricter requirements than those set by international agreements. *This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction.*

Id. at 493-94 (citations omitted) (emphasis added).

[9] Passage of OPA 90 by Congress only reinforces this court's conclusions in *Chevron* that "strict international uniformity" with respect to the regulation of tankers is not "mandate[d]" by federal law and that "international agreements set only minimum standards." *Id.* at 493. To reach any other conclusion, we would have to read § 1018 to provide that the Act permits state tanker regulation only when the field in question is not subject to international regulation. However, § 1018 plainly states that nothing in the Act shall be interpreted to prohibit states from imposing "any additional liability or requirements," 33 U.S.C. § 2718(a) (emphasis

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added), not merely “additional liability or requirements where such requirements would not conflict with an international treaty.”

3

The United States raises for the first time on appeal two arguments concerning specific conflicts between the BAP Regulations and international treaties. These arguments are: (1) that the BAP Regulations interfere with the international right of “innocent passage,” *see* United Nations Convention on the Law of the Sea, Dec. 10, 1982, § 3, arts. 17-25, 21 I.L.M. 1261, 1273-75; and (2) that the BAP Regulations conflict with a bilateral agreement between the United States and Canada concerning traffic in the Strait of Juan de Fuca at the entrance to Puget Sound, *see* The Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, Dec. 19, 1979, 32 U.S.T. 377. Generally, we will not consider arguments that are raised for the first time on appeal. *See Self-Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990); *Abex Corp. v. Ski's Enters., Inc.*, 748 F.2d 513, 516 (9th Cir. 1984). The court has discretion to address such arguments only: (1) “in the ‘exceptional’ case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process,” *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985) (quoting *United States v. Greger*, 716 F.2d 1275, 1277 (9th Cir. 1983)); (2) “when a new issue arises while appeal is pending because of a change in the law,” *id.*; or (3) “when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed,” *id.*

In support of its claim that we may exercise our discretion to address its new arguments, the United States cites our decision in *Kimes v. Stone*, 84 F.3d 1121 (9th Cir. 1996), in which we considered a Supremacy Clause argument raised for the first time on appeal. *See id.* at 1126. In *Kimes*, however, we

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noted that the issue was "purely a question of law" and that "consideration of the issue would not prejudice [the opposing party's] ability to present relevant facts that could affect our decision." *Id.* By contrast, the state defendants have not had the opportunity to develop the record concerning whether the BAP Regulations practically impair the right of innocent passage or are enforced in a manner that is inconsistent with the bilateral agreement with Canada covering traffic in the Strait of Juan de Fuca. Accordingly, we do not consider the United States's new treaty-based arguments on appeal.¹⁰

B

Intertanko next argues that federal regulation of oil tankers by OPA 90, the PWSA, the PTSA, and the Tank Vessel Act is so comprehensive as to preempt impliedly the field of tanker regulation. Field preemption exists when federal law so thoroughly occupies a legislative field " 'as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Fidelity Fed. Sav. & Loan Assn.*, 458 U.S. at 153 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230). The leading case on the subject of field preemption of state statutes that regulate tankers is *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). In *Ray*, the Supreme Court examined the preemptive effect of the PWSA on the Washington Tanker Law, 1975 Wash. Laws ch. 125, a statute that required various design-safety features for tankers operating in Puget Sound. The Court found that certain safety features imposed by the Washington Tanker Law were preempted, but that others were not. *See Ray*, 435 U.S. at 160, 168, 173, 178, 180.

1

One of the provisions of the Washington Tanker Law

¹⁰The United States does not assert that we have discretion to entertain its new arguments on miscarriage-of-justice grounds or because of a post-appeal change in the law.

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addressed in *Ray* required oil tankers weighing between 40,000 and 125,000 deadweight tons to possess certain safety features, including a minimum amount of horsepower, twin screws, two radars, and double hulls. *See id.* at 160. After a thorough examination of the regulatory scheme established by Title II of the PWSA, the Court found that these state requirements were impliedly preempted. *See id.* at 168. However, this finding of implied preemption was limited to the field of tanker "design and construction." *Id.* at 163-64. The Court stated:

This statutory pattern shows that Congress, insofar as *design characteristics* are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates to us that Congress intended uniform national standards for *design and construction* of tankers that would foreclose the imposition of different or more stringent state requirements. In particular, as we see it, Congress did not anticipate that a vessel found to be in compliance with the Secretary's *design and construction* regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its *design characteristics* constitute an undue hazard.

Id. (emphasis added); *see also id.* at 165 ("Enforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the *design* of oil tankers.") (emphasis added); *id.* at 166 ("That the Nation was to speak with one voice *with respect to tanker-design standards* is supported by the legislative history of Title II") (emphasis added); *id.* at 166 n.15 ("The Court has previously observed that ship *design and construction* are matters for national attention.")

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(emphasis added); *id.* at 168 n.19 ("Here it is sufficiently clear that Congress directed the promulgation of standards on the national level, as well as national enforcement, with vessels having *design characteristics* satisfying federal law being privileged to carry tank-vessel cargoes in United States waters.") (emphasis added).

[10] The *Ray* Court next proceeded to examine a provision of the Washington Tanker Law mandating tug escorts for any vessel that did not have the safety features required by the Tanker Law's other provisions. *See id.* at 171. The Court began its analysis of the tug-escort requirement by observing that a tanker's certification "under federal law as a vessel safe insofar as its design and construction characteristics are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." *Id.* at 168-69. The Court noted that the Washington Tanker Law's tug escort provision was "not a design requirement," but instead was "more akin to an operating rule arising from the peculiarities of local waters that call for special precautionary measures." *Id.* at 171. The Court further observed that "[t]he relevant inquiry . . . with respect to the State's power to impose a tug-escort rule is . . . whether the [Coast Guard] has either promulgated [its] own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all." *Id.* at 171-72. The Court concluded that because the Secretary had not imposed such a requirement, "the State's requirement need not give way under the Supremacy Clause." *Id.* at 172. These excerpts from *Ray* teach that "operating rule[s]," *id.* at 171, unlike design and construction requirements, are not automatically subject to field preemption by the PWSA. Attempting to distinguish *Ray*, Intertanko argues that *Ray*'s analysis of "operating rule[s], *id.*, applies only to those requirements that "aris[e] from the peculiarities of local waters." *Id.* This argument fails to recognize, however, that the operating requirements imposed by the BAP Regulations

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are designed for the same "local waters," namely Puget Sound, as was the Washington Tanker Law contested in *Ray*.¹¹

Intertanko also maintains that *Ray* used the phrase "design and construction" as a "shorthand" for all Title II PWSA matters, which include tanker operations as well as design and construction. Intertanko's interpretation of *Ray*, however, is plainly inconsistent with our own interpretation of the same case in *Chevron*. In *Chevron*, we stated:

The [*Ray*] Court's finding of preemption is *specifically limited to the regulation of vessel "design characteristics"* and thus does not control the outcome of the present case involving ocean pollutant discharges. As a matter of fact, *the court specifically explained that tankers must meet "otherwise valid state or federal rules or regulations that do not constitute design or construction specifications."*

Chevron, 726 F.2d at 487 (citations omitted) (quoting *Ray*, 435 U.S. at 168-69) (emphasis added). We concluded in *Chevron* that "deballasting" does not qualify as "design or construction" and that, consequently, deballasting regulations were not automatically preempted under *Ray*. *Id.* Because the discharge of ballast involves an "operation" directly related to the sailing of a tanker,¹² *Chevron* undermines Intertanko's

¹¹Intertanko asks us to rule that *Ray*'s holding does not apply to "on-board" operating rules. However, the relevant passage from *Ray* plainly refers to "operating rule[s]," *Ray*, 435 U.S. at 171, not merely "off-board operating rules." Contrary to what Intertanko's argument implies, we are not at liberty to limit a holding of the United States Supreme Court to its facts.

¹²As we observed in *Chevron*:

Unloaded oil tankers must take on seawater for ballast to ensure proper submergence and vessel stability. Upon arrival in port, the tankers must then discharge this ballast — i.e., "deballast" — before loading their cargo tanks with oil.

Chevron, 726 F.2d at 485.

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argument that the *Ray* Court used "design and construction" as "shorthand" for "design, construction, and operations."

[11] Virtually all of the challenged BAP Regulations impose operational requirements rather than design and construction requirements. These operational requirements include: accident reporting, *see* Wash. Admin. Code § 317-21-130; watch practices, *see* Wash. Admin. Code § 317-21-200; navigation procedures, *see* Wash. Admin. Code § 317-21-205; engineering procedures, *see* Wash. Admin. Code § 317-21-210; prearrival tests and inspections, *see* Wash. Admin. Code § 317-21-215; emergency procedures, *see* Wash. Admin. Code § 317-21-220; rules against altering or destroying records, *see* Wash. Admin. Code § 317-21-225; training programs, *see* Wash. Admin. Code § 317-21-230; illicit drugs and alcohol use, *see* Wash. Admin. Code § 317-21-235; personnel evaluation, *see* Wash. Admin. Code § 317-21-240; work hours, *see* Wash. Admin. Code § 317-21-245; language requirements, *see* Wash. Admin. Code § 317-21-250; training records for crew members, *see* Wash. Admin. Code § 317-21-255; management, *see* Wash. Admin. Code § 317-21-260; and advance notice of entry and safety reports, *see* Wash. Admin. Code § 317-21-540. Because these regulations do not qualify as "design and construction" requirements, they are not automatically subject to field preemption under *Ray*.

2

[12] We reach a different conclusion with respect to Wash. Admin. Code § 317-21-265, however.¹³ The first subsection

¹³Wash. Admin. Code § 317-21-265 provides, in full:

(1) Navigation Equipment. An oil spill prevention plan for a tank vessel must describe navigation equipment used on a vessel covered by the plan which includes:

(a) Global positioning system (GPS) receivers; and

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of that provision, entitled "Navigation Equipment," requires tankers to possess global positioning system ("GPS") receivers, as well as two separate radar systems. *See* Wash. Admin. Code § 317-21-265(1). The navigational equipment requirements imposed therein are virtually indistinguishable from the radar and navigation devices that the *Ray* Court found to be regulated preemptively by the PWSA. The Washington Tanker Law challenged in *Ray* required "[t]wo radars in working order and operating, one of which must be collision avoidance radar." *Ray*, 435 U.S. at 160. The *Ray* Court, after reviewing the requirements of the Washington Tanker Law, including the radar and navigational equipment requirements, stated that "the *foregoing design requirements*, standing alone, are invalid in light of the PWSA and its regulatory

(b) Two separate radar systems, one of which is equipped with an automated radar planning aid (ARPA).

(2) Emergency towing system. Tankers must be equipped with an emergency towing system on both the bow and stern within two years from the effective date of this chapter. The emergency towing system comprises:

(a) Designated strong points able to withstand the load to which they may be subjected during a towing operation in maximum sustained winds of forty knots and sea or swell heights of five and a half meters (18 feet);

(b) Appropriate chafing chains, towing pennant, tow line and connections of a size and strength to tow the tanker fully laden in maximum sustained winds of forty knots and sea or swell heights of five and a half meters (18 feet); and

(c) Appropriately sized and colored marker buoys attached to the towing pennants.

(3) The emergency towing system must be deployable:

(a) In 15 minutes or less by at most two crew members;

(b) From the bridge or other safe location when the release points are inaccessible; and

(c) Without use of the vessel's electrical power.

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implementation." *Id.* at 160-61 (emphasis added). Because the GPS and radar requirements are virtually identical to the navigational equipment required by the Washington Tanker Law, *Ray* dictates that Wash. Admin. Code § 317-21-265(1) must also be classified as a "design requirement[]." *Id.* at 160-61. Applying *Ray*, we hold that Wash. Admin. Code § 317-21-265(1) is preempted by the PWSA.

In support of its conclusion that the navigational equipment rules imposed by Wash. Admin. Code § 317-21-265(1) are not "design requirements" subject to preemption under *Ray*, the district court stated that "[t]he requirements for global positioning system receivers and two separate radar systems under WAC 317-21-265 should be considered equipment necessary for vessel operating procedures under 33 U.S.C. § 1223," and therefore "are not subject to implied preemption." *Intertanko*, 947 F. Supp. at 1495 n.9. Regardless of whether radar and other navigational systems "should" be considered "equipment necessary for vessel operating procedures," the Supreme Court considered them "design requirements." *Ray*, 435 U.S. at 160-61. We are bound by the *Ray* Court's classification of these devices as "design requirements," and by its conclusion that, as such, they are impliedly preempted by the PWSA. *See id.*

The second requirement imposed by Wash. Admin. Code § 317-21-265 is that all ships be equipped with an emergency towing package. *See* Wash. Admin. Code § 317-21-265(2). The state defendants contend that the towing package provision is "not a design or construction requirement," but rather a "requirement to have certain equipment installed on a tanker," and that, consequently, this provision is not preempted under *Ray*. However, the state defendants' argument fails to recognize that "design requirements" and "equipment requirements" are not mutually exclusive. *See Chevron*, 726 F.2d at 500 ("Alaska has left all *designing of vessels and equipment* to the Coast Guard and has only prohibited the discharge of polluted ballast.") (emphasis added). Section

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317-21-265(2) provides that towing equipment must meet several specific design standards. These standards include "[d]esignated strong points," Wash. Admin. Code § 317-21-265(2)(a), and "[a]ppropriate chafing chains, towing pennant, tow line and connections," Wash. Admin. Code § 317-21-265(2)(b), all of which must be capable of withstanding "sustained winds of forty knots and sea or swell of five and a half meters," Wash. Admin. Code § 317-21-265(2)(a), (b). Because such design requirements are preempted by the PWSA, *see Ray*, 435 U.S. at 160-61, we hold that the emergency towing package requirement, like the GPS and radar requirements, is invalid under the Supremacy Clause.

C

[13] We finally address whether any of the BAP Regulations are *expressly* preempted by federal law. In *Ray*, the Supreme Court held that, because the challenged tug-escort rule was not a design or construction requirement, "[t]he relevant inquiry . . . with respect to the State's power to impose [the] tug-escort rule is . . . whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all." *Ray*, 435 U.S. at 171-72. *Ray* thus teaches that once a court has determined that state tanker regulations are not subject to implied preemption as "design and construction" requirements, the court still must examine whether the state regulations are expressly preempted. Accordingly, having determined that all of the BAP Regulations except Wash. Admin. Code § 317-21-265 are not subject to implied preemption as design and construction requirements, we must now inquire whether those regulations are subject to express preemption.

[14] Intertanko contends that some of the BAP Regulations are expressly preempted not by any federal statute but by a variety of federal regulations issued by the Coast Guard. A

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federal agency, acting through its rulemaking processes, can effect preemption of state law. *See Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 153-54. Indeed, "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Id.* at 153. According to Intertanko, certain of the BAP Regulations are expressly preempted by Coast Guard statements accompanying the issuance of federal regulations concerning watch practices, *see* 58 Fed. Reg. 27,268, 27,632 (1993); steering gear for vessels underway, *see* 60 Fed. Reg. 24,767, 24,771 (1995); and drug and alcohol testing, *see* 58 Fed. Reg. 68,274, 68,277 (1993).¹⁴

[15] Preemption by regulations enacted by a federal agency does not occur if that agency is acting beyond the scope of its delegated powers. As the Supreme Court explained in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986):

[A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority. . . . [A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.

....

An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.

¹⁴Intertanko also contends that Wash. Admin. Code § 317-21-265 (navigation equipment and emergency towing system) is preempted by a Coast Guard regulation concerning on-board towing equipment. *See* 58 Fed. Reg. 67,988, 67,993 (1993). Because we hold that Wash. Admin. Code § 317-21-265 is invalid under *Ray*, we need not address this argument.

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Id. at 374-75; *see also United States v. Shimer*, 367 U.S. 374, 381-82 (1961) (administrative agency cannot preempt state law if "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned").

[16] *Louisiana Public Service Commission* teaches that the relevant inquiry in determining whether a federal regulation preempts state law is whether the agency "is acting within the scope of its congressionally delegated authority." *Id.* at 374. When it passed OPA 90, Congress required the Coast Guard to implement a wide range of oil-spill prevention rules. *See* 33 U.S.C. §§ 2701-2718. However, Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law. Indeed, § 1018 of OPA 90 establishes that nothing in OPA 90 may be construed as impairing the ability of the states to impose their own oil-spill prevention requirements.¹⁵ *See* 33 U.S.C. § 2718. In view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own, we find implausible the argument that it intended to delegate power to the Coast Guard to do so. Therefore, we reject Intertanko's position that the Coast Guard was "acting within the scope of its congressionally delegated authority," *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374, in enacting regulations that purport to preempt state law.

V

Intertanko next contends that the BAP Regulations violate the Commerce Clause. The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several states" U.S. Const., art. I, § 8.

¹⁵ Although § 1018 expressly applies only to OPA 90, it shapes the "full purposes and objectives" of Congress, *Hines*, 312 U.S. at 67, with respect to the entire legislative field of oil-spill prevention. *See* Part IV.A.1, *infra*. Accordingly, we hold that the operational requirements imposed by the BAP Regulations are not preempted by *any* federal regulations.

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Although this clause by its express terms serves only as an affirmative grant to the federal government of the power to regulate interstate commerce, it has also been interpreted by the Supreme Court to impose limits on the ability of the states to do so. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1596 (1997).

[17] The Supreme Court has distinguished between two types of impermissible state regulations that incidentally burden interstate commerce. A facially nondiscriminatory regulation supported by a legitimate state interest which incidentally burdens interstate commerce is constitutional unless the burden on interstate trade is clearly excessive in relation to the local benefits. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). However, when a regulation "clearly" discriminates against interstate commerce, it violates the Commerce Clause unless the discrimination is demonstrably justified by a valid factor unrelated to state protectionism. See *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). In *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008 (9th Cir. 1994), this court summarized the proper analysis as follows:

If the regulations discriminate in favor of in-state interests, the state has the burden of establishing that a legitimate state interest unrelated to economic protectionism is served by the regulations that could not be served as well by less discriminatory alternatives. In contrast, if the regulations apply evenhandedly to in-state and out-of-state interests, the party challenging the regulations must establish that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the putative local benefits.

Id. at 1012 (citations omitted).

[18] Intertanko asserts that the cost for a tanker operator to develop an oil-spill prevention plan that meets the standards

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established by the BAP Regulations is approximately \$12,000. However, Intertanko fails to point to any evidence in the record to establish that this "incidental burden[] on interstate and foreign commerce [is] clearly excessive in relation to the putative local benefits." *Id.* Nor does Intertanko even argue that the BAP Regulations "discriminate in favor of in-state interests." *Id.* Therefore, Intertanko's contention that the BAP Regulations violate the Commerce Clause is without merit.

VI

[19] Finally, Intertanko maintains that the BAP Regulations impermissibly intrude upon the foreign affairs power of the federal government. The Constitution entrusts the administration of foreign affairs to the President and to Congress. *See Zschernig v. Miller*, 389 U.S. 429, 432 (1968). Accordingly, "any state law that involves the state in the actual conduct of foreign affairs is unconstitutional." *Id.*

The only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power is *Zschernig v. Miller*, 389 U.S. 429 (1968). *Zschernig* involved an Oregon statute providing that a nonresident alien could not inherit from an Oregon decedent unless certain conditions were met. *See id.* at 440. The Supreme Court struck down the Oregon statute on the ground that it had "more than 'some incidental or indirect effect in foreign countries.'" *Id.* at 434 (quoting *Clark v. Allen*, 331 U.S. 503, 516-17 (1947)).

[20] By their own terms, the BAP Regulations apply only to vessels operating within Washington's territorial limits. *See* Wash. Rev. Code § 88.46.010. Intertanko objects to the potential *extraterritorial* impact of requirements that: (1) owners report hazardous events regardless of whether the events occur outside of Washington, *see* Wash. Admin. Code § 317-21-130; (2) crew training and drill programs be conducted, *see* Wash. Admin. Code § 317-21-230; (3) personnel

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and record keeping procedures be administered, *see* Wash. Admin. Code § 317-21-255; and (4) owner and operations management programs be followed, *see* Wash. Admin. Code § 317-21-260. However, Intertanko has failed to demonstrate that, even if these regulations have some extraterritorial impact, that impact is more than "incidental or indirect." *Zschernig*, 389 U.S. at 434. Accordingly, we reject Intertanko's argument that the BAP Regulations infringe upon the foreign affairs power of the federal government.

VII

We affirm in part and reverse in part the district court's grant of summary judgment in favor of the State of Washington. We reverse the district court's holding that Wash. Admin. Code § 317-21-265 is not preempted by federal law. However, we affirm the district court's judgment as to all other

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challenged BAP Regulations. Each side shall bear its own costs on appeal.

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED.**

**APPENDIX B — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON AT SEATTLE DATED, ENTERED
AND FILED NOVEMBER 18, 1996**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C95-1096C

THE INTERNATIONAL ASSOCIATION OF
INDEPENDENT TANKER OWNERS
(INTERTANKO),

Plaintiff,

v.

MIKE LOWRY, et al.,

Defendants.

ORDER

This matter comes before the Court on cross-motions for summary judgment filed by plaintiff, defendants and intervenors. Having heard oral argument, and having reviewed the pleadings, memoranda, exhibits and other documents on file, the Court now finds and concludes as follows:

*Appendix B***I. Background**

This is a lawsuit brought by the International Association of Independent Tanker Owners ("Intertanko") against Washington State, certain state officials, and four county prosecutors. Intertanko seeks an order declaring that certain Washington statutes and regulations pertaining to the operation of oil tankers in state waters are unconstitutional. Three environmental groups, the National Resources Defense Council, the Washington Environmental Counsel and Ocean Advocates, Inc., have intervened.

The marine waters of Washington include a rocky ocean coastline, the "inland sea" of Puget Sound, and the Strait of Juan de Fuca. These waters host ecosystems that are as rich and diverse as any in the world. These waters are also highly susceptible to damage from oil pollution. Puget Sound is particularly vulnerable because it is relatively confined and shallow. Puget Sound is also difficult to navigate due to vessel traffic, fog and natural obstructions.

Intertanko is a trade association with approximately 253 members and 152 associate members who own or operate tankers. Intertanko's members represent on a tonnage basis, approximately 80 percent of the world's independently owned tanker fleet. Intertanko members call at oil facilities in Puget Sound, and travel along the Columbia River to reach ports in Oregon.

Intertanko challenges several statutes and regulations that have been implemented by the state to prevent oil spills and thereby protect Washington waters. *See* RCW 88.46.010,

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et seq., and WAC 317-21-010, *et seq.* Intertanko specifically asserts that RCW 88.46.010(2)-(3), and RCW 88.46.040(3) are preempted or otherwise invalidated by federal law. In order to transport oil in state waters, these statutes require tank vessel operators to file oil spill prevention plans. These plans must provide for the best achievable protection from damages caused by the discharge of oil, and must comply with regulations adopted by the State Office of Marine Safety ("OMS").

Intertanko also asserts that 16 regulations promulgated by the OMS are invalid. These regulations lay out specific requirements that tanker vessel operators must satisfy to meet the best achievable protection standards in their prevention plans. These regulations may be summarized as follows:

1. Event Reporting – WAC 317-21-130. Requires operators to report all events such as collisions, allisions and near-miss incidents for the five years preceding filing of a prevention plan, and all events that occur thereafter for tankers that operate in Puget Sound.
2. Operating Procedures – Watch Practices – WAC 317-21-130. Requires tankers to employ specific watch and lookout practices while navigating and when at anchor, and requires a bridge resource management system that is the "standard practice throughout the owner's or operator's fleet," and which organizes responsibilities and coordinates communication between members of the bridge.
3. Operating Procedures – Navigation – WAC 317-21-205. Requires tankers in navigation in state waters to

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record positions every fifteen minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way.

4. Operating Procedures – Engineering – WAC 317-21-210. Requires tankers in state waters to follow specified engineering and monitoring practices.

5. Operating Procedures – Prearrival Tests and Inspections – WAC 317-21-215. Requires tankers to undergo a number of tests and inspections of engineering, navigation and propulsion systems twelve hours or less before entering or getting underway in state waters.

6. Operating Procedures – Emergency Procedures – WAC 317-21-220. Requires tanker masters to post written crew assignments and procedures for a number of shipboard emergencies.

7. Operating Procedures – Events – WAC 317-21-225. Requires that when an event transpires in state waters, such as a collision, allision or near-miss incident, the operator is prohibited from erasing, discarding or altering the position plotting records and the comprehensive written voyage plan.

8. Personnel Policies – Training – WAC 317-21-230. Requires operators to provide a comprehensive training program for personnel that goes beyond that necessary to obtain a license or merchant marine document, and which includes instructions on a number of specific procedures.

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9. Personnel Policies – Illicit Drugs and Alcohol Use – WAC 317-21-235. Requires drug and alcohol testing and reporting.
10. Personnel Policies – Personnel Evaluation – WAC 317-21-240. Requires operators to monitor the fitness for duty of crew members, and requires operators to at least annually provide a job performance and safety evaluation for all crew members on vessels covered by a prevention plan who serve for more than six months in a year.
11. Personnel Policies – Work Hours – WAC 317-21-245. Sets limitations on the number of hours crew members may work.
12. Personnel Policies – Language – WAC 317-21-250. Requires all licensed deck officers and the vessel master to be proficient in English and to speak a language understood by subordinate officers and unlicensed crew. Also requires all written instruction to be printed in a language understood by the licensed officers and unlicensed crew.
13. Personnel Policies – Record Keeping – WAC 317-21-255. Requires operators to maintain training records for crew members assigned to vessels covered by a prevention plan.
14. Management – WAC 317-21-260. Requires operators to implement management practices that demonstrate active monitoring of vessel operations and

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maintenance, personnel training, development and fitness, and technological improvements in navigation.

15. Technology – WAC 317-21-265. Requires tankers to be equipped with global positioning system receivers, two separate radar systems, and an emergency towing system.

16. Advance Notice of Entry and Safety Reports – WAC 317-21-540. Requires at least twenty-four hours notice prior to entry of a tanker into state waters, and requires that the notice report any conditions that pose a hazard to the vessel or the marine environment.

Intertanko relies on a number of federal statutes, regulations and international treaty obligations to assert that the state statutes and regulations improperly intrude into a field controlled by the federal government. Most of the federal law relied on by Intertanko is derived from the Tank Vessel Act of 1936, the Ports and Waterways Safety Act of 1972 ("PWSA"), the Port and Tanker Safety Act of 1978 ("PTSA")¹, and the Oil Pollution Act of 1990 ("OPA 90")². The progressive passage of these acts by Congress either added to or amended prior law regarding the regulation of oil tankers. The provisions of these acts are largely found in Titles 33 and 46 of the United States Code. These laws impose specific requirements for tankers or delegate to the Coast Guard the responsibility for promulgating specific standards.

1. These two acts are often referred to together as the "PWSA/PTSA."

2. Pub. L. No. 101-380, 104 Stat. 486 (August 18, 1990).

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Intertanko also relies on a handful of treaties to which the United States has acceded. These include the International Convention for the Safety of Life at Sea, 1974 ("SOLAS"), the International Convention for the Prevention of Pollution from Ships, 1973, and the Protocol of 1978 ("MARPOL"), the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978 ("STCW"), and the International Regulation for Preventing Collisions at Sea, 1973 ("COLREGS"). These treaties have all been signed and ratified by the United States.³

II. Discussion

This case tests the extent to which Washington State may protect its marine environment by regulating oil tankers in the areas of operations, personnel, management, technology and information reporting. Although protection of the marine

3. A treaty cannot, however, have any impact on domestic laws unless it is self-executing, or unless its terms are enacted as parts of statutes or administrative regulations. *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985). There are at least four relevant factors to be considered when determining whether a treaty is self-executing: "(1) 'the purposes of the treaty and the objectives of its creators,' (2) 'the existence of domestic procedures and institutions appropriate for direct implementation,' (3) 'the availability and feasibility of alternative enforcement methods,' and (4) 'the immediate and long range social consequences of self- or non-self-execution.'" *Id.* (quoting *People of Saipan v. United States Department of Interior*, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975)). Intertanko has not addressed these four factors in asserting that the treaties it relies upon are self-executing. Intertanko has, however, identified where these treaties have been implemented by federal statute and regulation.

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environment has historically been within the reach of the police powers of the states, shipping has traditionally been governed by federal law. Thus the Washington oil spill prevention statutes and regulations overlap requirements imposed by the federal government. This overlap creates a tension between the power of the state and the power of the federal government.

Intertanko seeks to resolve this tension. Intertanko argues that the Washington oil spill prevention statutes and regulations are preempted by federal statutes and regulations, and by federal treaty obligations through the Supremacy Clause of the United States Constitution. It also argues that the oil prevention statutes and regulations violate the Foreign Affairs Clause of the Constitution and the Commerce Clause of the Constitution. In addition, it asserts that the regulations are invalid because they reach beyond the three mile territorial limit of the navigable waters of Washington State.

Intertanko moves for summary judgment and asks the Court to enjoin the enforcement of the oil spill prevention laws. Defendants and intervenors move for summary judgment dismissing Intertanko's complaint. Because the resolution of this case depends almost exclusively on questions of law, there are no genuine issues of material fact and Intertanko's claims may be fully litigated on summary judgment. Fed. R. Civ. P. 56.

A. Preemption.

"[W]hen a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the

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assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988 (1978). Explicit preemption is present when Congress so declares. *Id.* Implicit preemption is present if the scheme of federal regulation is so pervasive as to indicate that Congress left no room for state action. *Id.* It may also be inferred when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146 (1947).

In those cases where Congress has not totally foreclosed state regulation, a state statute is preempted if it conflicts with a federal statute. *Ray*, 455 U.S. at 158. "A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . . , or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399 (1941)).

Express and implied preemption do not require that state and federal rules conflict. A state rule may be preempted under these theories when it is different than the federal rule. The state and federal rule must, however, be at odds for conflict preemption to apply.

*Appendix B**1. Oil Pollution Act of 1990.*

As an initial matter, defendants and intervenors assert that OPA 90 expressly prohibits the preemption of state oil spill prevention laws. Congress passed OPA 90 soon after the Exxon Valdez oil spill in Prince William Sound. The Act addresses oil pollution liability, compensation, prevention and removal.

Defendants and intervenors rely on OPA 90 § 1018, which is codified at 33 U.S.C. § 2718. Section 1018 of the Act states in relevant part:

(a) PRESERVATION OF STATE
AUTHORITIES; SOLID WASTE DISPOSAL
ACT — Nothing in this Act . . . shall —

(1) affect, or be construed or interpreted
as preempting, the authority of any State
or political subdivision thereof from
imposing any additional liability or
requirements with respect to —

(A) the discharge of oil or
other pollution by oil within
such State; or

(B) any removal activities in
connection with such a
discharge;

* * *

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(c) ADDITIONAL REQUIREMENTS AND LIABILITIES, PENALTIES — Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof —

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil.

Defendants and intervenors claim that this language recognizes the right of states to impose additional requirements to prevent oil spills. The starting point for statutory interpretation is consideration of the language employed by Congress, and consideration of the statute as a whole, including its history and purposes. *United States v. van den Berg*, 5 F.3d 439, 442 (9th Cir. 1993).

The language of section 1018 is best understood when the Act as a whole is considered. Section 1018 of OPA 90 is located in "Title I – Oil Pollution Liability and Compensation." Title I of OPA 90 sets the standards for liability and damages for the discharge of oil or the substantial threat of discharge of oil into the navigable waters of the United States. The Act also includes "Title IV – Prevention

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and Removal.” This title sets standards for tanker personnel qualifications, manning, operations, design and construction. It also directs the President to prepare a National Contingency Plan for the removal of oil, and to require tank vessel operators to prepare individual response plans for the removal of oil.

The language of the savings clause relied on by defendants and intervenors applies broadly to “this Act,” which includes oil pollution liability, compensation, prevention and removal requirements. It makes clear that states are not preempted from adding additional “requirements with respect to . . . the discharge of oil,” or “relating to the discharge . . . of oil.” Because the Act comprehensively addresses oil discharge liability, compensation, prevention and removal, all provisions of the Act must be “with respect to” or “relating to” the discharge of oil. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S.Ct. 478 (1990) (a law relates to a subject when it has a connection with or reference to that subject). Pursuant to the broad language of section 1018, it follows that none of the provisions of OPA 90 preempt the ability of the states to add to federal requirements in the areas addressed by the Act.

Intertanko’s assertion that the savings clause is limited to liability, compensation, and removal, but not prevention, is not supported by the broad language employed in section 1018. Moreover, Intertanko’s assertion that the nonpreemption language is limited in its application by its placement in Title I is refuted by the explicit allowance in section 1018 for additional state regulation of “removal activities.” Removal activities are regulated not in Title I,

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but in Title IV along with prevention standards. Thus the savings clause cannot be limited to Title I, but must also include Title IV.

In addition, Intertanko's assertion that applying the savings clause to the prevention requirements would run afoul of international standards is undermined by other provisions in the Act. Foremost is the requirement that oil tankers have double hulls. 46 U.S.C. § 3703a. This contradicts the international standards imposed by Regulation 13F to Annex I of MARPOL, and demonstrates that Congress was not overly concerned with maintaining uniformity with such standards. In addition, the Act clearly states that it is in the best interests of the United States to participate in a international regime "that is at least as effective as Federal and State law in preventing incidents . . ." OPA 90 § 3001.⁴ This anticipates that federal and state laws may be more effective than international standards.

The application of the savings clause to prevention regulations is also supported by the legislative history of OPA 90. The Conference Report on the final version of OPA 90 explains the preemptory effect of the Act:

Thus, subsection (a) of section 1018 of the substitute states explicitly that nothing in the substitute [bill] . . . shall affect in any way *the authority of the State or local government to*

4. Although this statement relates only to liability and removal regimes, it supports the view that Congress did not intend the provisions of OPA 90 to be limited by international standards.

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impose additional liability or other requirements with respect to oil pollution or to the discharge of oil within the State or with respect to any removal activities in connection with such discharge.

H.R. Conf. Rep. No. 101-653, 101st Cong., 1st Sess., p. 121 (1990), *reprinted in* 1990 U.S.C.C.A.N. 800 (emphasis added). This language reemphasizes that the Act broadly saves to states the ability to impose additional "requirements with respect to oil pollution."⁵

The impact of the savings clause on prevention standards is further highlighted by a letter to the Coast Guard Commandant from the Washington State Congressional Delegation dated September 28, 1993. That letter concerned the application of Washington's regulations to vessels passing through state waters to reach Canada. The delegation said "[w]e are extremely concerned with the Coast Guard's threats to void state oil prevention standards for these Canada-bound vessels. In the Oil Pollution Act of 1990 Congress provided that state laws, requirements and jurisdiction would not be preempted by federal law. The U.S. Coast Guard should not be obstructing the state's efforts to protect state waters."

5. The Conference Report also stated that OPA 90 "does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*, 435 U.S. 151 (1978)." The citation to *Ray* may mean that there was an intention not to eradicate the Court's holding that federal law impliedly preempted state tanker design and construction regulations. *Ray*, 435 U.S. at 163-64. That would not create an issue in this case because none of the Washington regulations control design and construction. Moreover, if there is a conflict between a statute and legislative history, the statute prevails. *In re the Matter of Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989).

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The only other court to address the nonpreemption language of OPA 90 also concluded that the Act saved to states the ability to impose additional requirements with regard to all aspects of oil pollution liability, compensation, prevention and removal. In *Berman Enterprises, Inc. v. Jorling*, 793 F.Supp. 408, 414-16, (E.D.N.Y. 1992), *aff'd*, 3 F.3d 602 (2nd Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994), the court examined a New York statute that required vessels to obtain a state license that among other things necessitated a showing that the vessel "can provide necessary equipment to prevent, contain and remove discharges of petroleum." *Id.* at 411 (citing New York Navigation Law § 174(3)). The Court concluded that the OPA 90 savings clause made clear that the New York statute was not preempted. It concluded that the statute was actually an acceptance of "the federal government's invitation to provide additional means of enforcing the federal policy favoring clean water." *Id.* at 416.

In similar fashion, upon a review of the language, structure, and legislative history of the Act, the Court concludes that OPA 90's express nonpreemption language applies to the Washington State regulations, which govern tanker operations, personnel, management, technology and information reporting. These regulations cover much of the same ground addressed by the prevention provisions of OPA 90, which set standards for tanker personnel qualifications, manning, operations, design and construction. The Act made clear that Congress places a high priority on reducing the threat of oil pollution, and that states may impose additional requirements to meet these goals.

*Appendix B**2. Implied Field Preemption.*

Intertanko's assertion that a majority of the challenged regulations are invalid under the theory of implied field preemption is largely foreclosed by the nonpreemption language of OPA 90. Implied field preemption is present if the scheme of federal regulation is so pervasive as to indicate that Congress left no room for state action, or if the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Ray*, 435 U.S. at 157.

Intertanko primarily asserts that the comprehensive regulation of oil tankers by the Federal government leaves no room for state regulation, which is thus preempted. There can be no doubt that the areas addressed by the Washington oil spill prevention rules, which generally cover tanker operations, personnel, management, technology and information reporting, are also comprehensively regulated by federal statutes, regulations and treaty obligations. Comprehensive regulation of an area alone, however, is not enough to infer preemption. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716-18, 105 S.Ct. 2371 (1985). There must be some additional showing that Congress intended the comprehensive nature of the regulation to foreclose state action.

In *Ray* the Supreme Court held that Congress impliedly occupied the field in the area of tanker design and construction. Among other things, the Court examined a Washington statute that required all oil tankers entering state waters to have certain standard safety features, including a

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minimum amount of horsepower, twin screws, and double hulls. *Ray*, 435 U.S. at 160. The Court found that these state law requirements were impliedly preempted under the regime imposed by Title II of the PWSA.⁶ It specifically examined 46 U.S.C. § 391a (1970 Ed., Supp. V), the provisions of which are now largely codified at 42 U.S.C. § 3703. With language similar to the current statute, the former version of section 3703 required the Coast Guard to issue regulations regarding the "design, construction, and operation" of tankers in order to protect "life, property, and the marine environment from harm." *Ray*, 435 U.S. at 161.

Based on this statutory scheme the Court concluded that "Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States." *Id.* at 163. As a result, "Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements." *Id.* at 163-64.

The Court also noted that states have more latitude outside the area of tanker design and construction. "Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." *Id.* at 168-69.

6. Title I is now codified as amended in 33 U.S.C. §§ 1221-1232, and Title II is now codified as amended at 46 U.S.C. §§ 3701-3718.

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In this regard, the *Ray* Court addressed the impact of Title I of the PWSA on a Washington State regulation that required tug escorts for tankers over 40,000 DWT when certain design requirements were not met. The Court noted that Title I of the PWSA provided that the Coast Guard "may" promulgate vessel operating requirements, which could impose certain vessel traffic services and systems, could require equipment necessary to follow these services and systems, could control vessel traffic by among other things specifying size and speed limitations, and could restrict vessel operations to those having the particular operating characteristics that are necessary for safety. *Id.* at 169-70. This authorization for Coast Guard action was codified at 33 U.S.C. § 1221 (1970 ed., Supp. V), and is currently located in large part at 33 U.S.C. § 1223.

The Court concluded that a tug escort provision was not a design requirement that would be subject to implied field preemption, but was instead an operating rule "arising from the peculiarities of local waters that call for special precautionary measures." *Id.* at 171. Because with regard to operating rules, the PWSA authorized but did not require the Coast Guard to issue controlling regulations, the Court found no implied field preemption. *Id.* It also concluded that because the Coast Guard had not promulgated tug escort provisions for Puget Sound, there was no conflict between the state rule and federal law. *Id.* at 172.⁷

7. The *Ray* Court also made clear that certain environmental laws were not preempted by federal shipping laws and regulations. It explained that states can still require federally certified vessels to conform to "reasonable, nondiscriminatory conservation and

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The Ninth Circuit has also examined the preemptive effect of federal shipping regulations. In *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985), the court examined an Alaska statute that prohibited oil tankers from discharging ballast water that had been stored in oil tanker holds. Instead, the state statute required tankers to discharge such ballast water into on-shore processing facilities. Chevron claimed that the statute was preempted by title II of the PWSA/PTSA, which required the Coast Guard to issue regulations concerning deballasting. That authority exists today under 46 U.S.C. § 3703(a)(7).⁸ The Coast Guard regulations concerning deballasting were less stringent than the Alaska statute.

The Ninth Circuit held that the federal statute and regulatory scheme did not impliedly preempt the state regulation concerning deballasting. *Id.* at 495. In reaching this decision, the court distinguished between the federal regulation of vessel "design characteristics," which were found to preempt state law in *Ray*, and the federal regulation

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environmental protection measures' " *Id.* (quoting *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 277, 97 S.Ct. 1740 (1977)); see also *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 343, 93 S.Ct. 1590 (1973) ("sea-to-shore pollution [has been] historically within the reach of the police power of the States").

8. It should be noted that section 3703(a)(7) is the successor to the statute that required the Coast Guard to promulgate regulations for the design and construction of tankers in *Ray*, which requirements were found to preempt Washington law. Thus a regulation mandated by 46 U.S.C. § 3703 does not automatically preempt state law.

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of "pollutant discharges." *Hammond*, 726 F.2d at 488. It noted that the Supreme Court in *Ray* concluded that " 'ship design and construction standards are matters for national attention,' " but that "[t]he subject matter of environmental regulation, on the other hand, has long been regarded by the Court as particularly suited to local regulation." *Id.* (quoting *Ray*, 435 U.S. at 166 n.15). The Ninth Circuit classified the Alaska statute concerning the disposal of ballast water as an environmental regulation limiting the discharge of pollutants from tankers. *Id.* It concluded that while the statute was not subject to implied field preemption, it could be, but was not, subject to conflict preemption. *Id.* at 495, 501.

The Ninth Circuit also addressed the degree to which federal shipping regulations preempted state law in *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991). At issue there was a municipal ordinance regulating moorage and anchorage in Santa Barbara Harbor. The court concluded that while the Coast Guard had extensive authority to regulate the anchoring, mooring and movement of vessels under 33 U.S.C. § 1223, that was not enough to create implied preemption. It explained:

Just as *Ray* refused to find implicit preemption and proceeded to discuss the *actual* conflicts between Washington's Tanker Law and federal regulations, we cannot hold that the PWSA occupies the entire field of regulation of anchorage and mooring. We cannot distinguish tanker (*Ray*) and pollution (*Chevron*) regulations from mooring restrictions. If both the Supreme Court and this circuit did not find Congress to have intended to preempt all local

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regulation by the PWSA in those areas, it is difficult to conceive how it could be found here.

Id. at 863. Moreover, the Court recognized that there is "congressional intent that 'there be joint federal/state regulation of ocean waters within three miles of shore.' " *Id.* at 864 (quoting *Chevron*, 726 F.2d at 489. The Court went on to find that there was no actual conflict between the municipal ordinance and federal law. *Id.* at 864-65.

From *Ray* and its progeny two levels of preemption for statutes and regulations like those at issue here may be distilled. These categories depend on the subject matter that is being regulated. State regulation of oil tanker design and construction is impliedly preempted by federal law. *Ray*, 435 U.S. at 163-64. State regulation of tanker operations "arising from the peculiarities of local waters that call for special precautionary measures" is not subject to implied field preemption, but may not actually conflict with federal regulation. *Ray*, 435 U.S. at 171. State regulation of water pollution is also not subject to implied field preemption, but may not actually conflict with federal regulation. *Chevron*, 726 F.2d at 495.

Here, the Washington regulations govern vessel operations in order "to protect the state's natural resources and waters . . ." RCW 88.46.010. To do so standards are imposed in the areas of tanker operations, personnel, management, technology and information reporting. These areas are much more akin to the operational tug escort provisions upheld in *Ray*, than to the design and construction

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requirements that were struck down in that case.⁹ The state regulations arise "from the peculiarities of local waters that call for special precautionary measures." *Ray*, 435 U.S. at 171.

Moreover, these standards are intended to protect the environment, and thus are an exercise of the state's police powers. When vessels are involved, however, there is an unavoidable overlap between state and federal regulation. But when the concern is pollution, the Ninth Circuit has recognized the need for "joint federal/state regulation of ocean waters within three miles of shore." *Chevron*, 726 F.2d at 489. This partnership was further verified by the nonpreemption clause of OPA 90. As such, the Court cannot conclude that the Washington oil spill prevention statutes and regulations are impliedly preempted.¹⁰

9. A portion of the state statute struck down in *Ray* did include radar and navigational position locating systems. *Ray*, 435 U.S. at 160. Such requirements are more aptly included as regulations under Title I of the PWSA/PTSA, 33 U.S.C. § 1223, which provides that the Coast Guard may establish vessel traffic services in navigable waters of the United States, and in doing so "may require vessels to install and use specified navigation equipment, communications equipment, electronic relative motion analyzer equipment, or any electronic or other device . . ." Thus the requirements for global positioning system receivers and two separate radar systems under WAC 317-21-265 should be considered equipment necessary for vessel operating procedures under 33 U.S.C. § 1223. These requirements are not subject to implied preemption.

10. Intertanko also argues that implied field preemption is necessitated because of the strength of the federal interest in maritime
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3. *Express Preemption.*

Intertanko hinges its claim of express preemption on several federal regulations issued by the Coast Guard, in which it is stated that the regulation is intended to preempt state law. As a general rule, "[f]ederal regulations have no less preemptive effect than federal statutes." *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014 (1982). Where Congress has directed an agency to exercise its discretion in regulating a field, the agency may issue regulations that preempt state law. *Id.* at 154. Such regulations may be effective so long as the agency has not exceeded the scope of its delegated authority, and has not acted in a manner that conflicts with the intent of Congress with regard to preemption as stated in the derivative statute or its legislative history. *Id.*

(Cont'd)

law uniformity. See *Rice*, 331 U.S. at 230. This argument is not sufficient on its own to justify a finding of implied field preemption. The Ninth Circuit has explained that "the general rule on preemption in admiralty is that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system. *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1422 (9th Cir. 1990) (emphasis in original), *cert. denied*, 504 U.S. 979 (1992). This statement recognizes that the federal interest in maritime law does not always preempt state law. Moreover, the touchstone for preemption is conflict with federal law or interference with uniformity. These tests lead back to the question of whether the federal regulation is sufficiently comprehensive in the field to prohibit conflict and to require uniformity. Moreover, any question about whether the need for uniformity creates implied preemption is foreclosed by OPA 90.

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Intertanko alleges that one of the Washington oil spill prevention statutes, and five of the oil spill prevention regulations or subparts are expressly preempted by regulations issued by the Coast Guard.

In this instance, however, Congress did not intend to give the Coast Guard authority to preempt state law with regard to the prevention of oil spills. The nonpreemption language of OPA 90 § 1018 prohibits the Coast Guard from doing so. *See Fidelity Federal*, 458 U.S. at 154.

In the one regulatory statement where the Coast Guard attempted to reconcile OPA 90 and *Ray*, it misconstrued the law and overstated its authority to preempt. Intertanko argues that 33 C.F.R. § 155.225, which requires oil tankers to have certain emergency towing capabilities, expressly preempts WAC 317-21-265(2), which requires tankers to be equipped with an emergency towing system. When it promulgated the federal rule, the Coast guard stated that:

This rule establishes regulations requiring certain vessels to carry discharge removal equipment. In [*Ray*], the Supreme Court found that vessel design and equipment standards fall within the exclusive province of the Federal Government. The OPA 90 Conference Report explicitly says that provisions in section 1018 of OPA 90 preserving certain State authority are not meant to disturb this Supreme Court decision. Therefore, the Coast Guard intends this rule to preempt State action addressing the same subject matter.

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Discharge Removal Equipment for Vessels Carrying Oil, 58 Fed. Reg. 67,995 (1993) (citation omitted). Because *Ray* required implied preemption only in the areas of tanker design and construction, and not with regard to equipment standards, the Coast Guard statement is inaccurate. Moreover, because a tow package is considered an item of discharge removal equipment, it is directly saved by the language of OPA 90 allowing states to impose additional requirements with respect to "any removal activities." OPA 90 § 1018(a)(1)(B). The Coast Guard was without authority to preempt state law with this regulation, or with the other regulations cited by Intertanko.

4. Conflict Preemption.

Intertanko also argues that some of the Washington regulations are in direct conflict with federal rules, and as such are preempted. Intertanko does not, however, identify any conflicts that require preemption. A state law is in conflict with and preempted by federal law (1) if compliance with both state and federal law is a physical impossibility or (2) if the state law stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress. *Ray*, 455 U.S. at 128.

Intertanko identifies eight Washington regulations that parallel new requirements that are to be imposed on February 1, 1997 pursuant to the 1995 amendments to the STCW. The new STCW requirements are being implemented by the Coast Guard through federal regulations. Intertanko asserts that there is a direct conflict because the state is requiring immediate implementation of these rules through its oil spill prevention regulations, rather than waiting until February 1,

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1997. The state provisions cited by Intertanko require certain watch practices, navigation practices, training requirements for crew members, personnel evaluations, limitations on working hours, English language requirements, and management practices for the oversight of tankers. See WAC 317-21-200, 205(1)-(3), 230, 235, 240, 245 and 260.

First, to the extent that the Washington regulations require earlier implementation of the new STCW standards, compliance with state and federal law will not be a physical impossibility. *Ray*, 455 U.S. at 128. Rather, early implementation will actually help operators be in compliance with the new STCW requirements when they become effective on February 1, 1997. Second, given the Congressional statement in OPA 90 as to the lack of preemption for additional, state imposed prevention requirements, the state regulations will not stand as an obstacle to the accomplishment and execution of the full purpose and objective of the new standards. *Id.* Indeed, the state regulations complement the federal goal of reducing "human error as a major cause of maritime casualties." Implementation of the 1995 Amendments to the STCW, 61 Fed. Reg. 13284 (March 26, 1996).¹¹

11. Intertanko raises a similar complaint with regard to WAC 317-21-260(2), which requires vessel operators to have a management program, which meets the requirements of at least one of four international ship management regimes. One of these is the International Maritime Organization's International Safety Management Code ("ISM"). This code is to become mandatory for vessels operating in international trade on July 1, 1998. Intertanko alleges that the Washington regulations conflict because they require compliance prior to that date. Even if early compliance created an actual conflict, no such conflict would exist because the ISM is just one of four regimes tanker operators can follow.

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Intertanko's emphasis on uniformity with international standards is also undercut by the Coast Guard's proposed rulemaking to implement the STCW. The Coast Guard explains that while it has tried to avoid "unnecessary additional requirements when international standards are being implemented. . . . In some cases, clear differences with the international scheme are retained to preserve continuity in the U.S. licensing system." 61 Fed. Reg. at 13285.

The same analysis holds true for the two federal regulations for which Intertanko alleges an actual conflict with state rules. Intertanko says that WAC 317-21-250, which requires that all masters and licensed deck officers be able to speak English, and be able to speak a language understood by subordinate officers and unlicensed crew, conflicts with 46 U.S.C. § 8702(b), which requires that 75 percent of the crew in each department on board be able to understand any order spoken by the officers. If, however, a vessel is in compliance with the state regulation, it will necessarily be meeting the less stringent requirements of federal law. Thus dual compliance is not impossible.

Intertanko also asserts that WAC 317-21-200(1), which requires that the navigation watch include two or three licensed deck officers, one of whom "may be a state-licensed" pilot, conflicts with 46 U.S.C. § 8502, which permits the use of federal pilots on United States tankers participating in coastwise trades. There is no conflict in this instance because the Washington regulation does not require a state-licensed pilot to be used as a lookout.¹²

12. As with the early implementation of the STCW standards, neither WAC 317-21-250 or 317-21-200(1) will prevent achievement of federal goals.

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B. Commerce Clause.

Intertanko argues that the Washington oil spill prevention statutes and regulations unconstitutionally limit commerce. Two types of state regulations may violate the Commerce Clause: "(1) those that directly burden interstate commerce or that discriminate against out-of-state interests and (2) those that burden interstate transactions only incidentally." *Kleenwell Biohazard Waste and General Consultants, Inc. v. Nelson*, 48 F.3d 391, 395 (9th Cir.), *cert. denied*, 115 S.Ct. 2580 (1995). Regulations in the first category are usually invalid unless the state can show that a legitimate local interest unrelated to economic protection is served and no less discriminatory alternative exists. *Id.* Those in the second category may be invalid if the challenging party can demonstrate that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the putative local benefits." *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir.), *cert. denied*, 115 S.Ct. 297 (1994).

Intertanko alleges that the Washington oil spill prevention regime directly regulates commerce because tanker traffic by definition involves the interstate or international transportation of oil. The Ninth Circuit has explained, however, that a state law does not directly regulate interstate commerce merely because it concretely affects a business engaged in interstate commerce. *Kleenwell*, 48 F.3d at 396. If that were the case, any regulation that affected interstate commerce would be forbidden. *Id.* Rather, the term is used "to refer to regulations whose *central* purpose is to regulate commerce, usually in order to benefit local interests." *Id.*

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(emphasis in original). The Commerce Clause does not "invalidate state regulations whose primary purpose is to address a legitimate local concern and whose incidental effect is to regulate interstate commerce." *Id.*

The Washington oil spill prevention rules are not impermissibly aimed at regulating commerce, or otherwise impeding interstate trade to protect state business interests. The statutes and regulations are instead intended to protect local waters from pollution.

The statutes and regulations at issue are similar to the law upheld in *Kleenwell*. There, the state required waste haulers to obtain a certificate of public convenience and necessity in order to transport and dispose of waste. *Id.* at 393. A waste hauler challenged the certificate requirement as a direct burden on its interstate hauling of waste. *Id.* at 395-96. The court concluded that the purpose of the statute was not the regulation of commerce, but was instead the legitimate local concern of ensuring the safe disposal of solid waste. *Id.* at 398. It noted that Congress by statute had "explicitly found that the field of solid waste collection is properly subject to state regulation." *Id.* Thus the Court found no direct regulation of commerce. *Id.*

In the present case oil tanker operators must file and obtain approval of an oil spill prevention plan in order to operate in state waters. RCW 88.46.040. The purpose of the requirement is to protect state waters and the marine environment, reduce the risk of a vessel casualty causing an oil spill, and to encourage procedures and technology that increase the safety of marine transportation and that

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protect the state's natural resources. WAC 317-21-010. To accomplish these goals the state requires operators to demonstrate through prevention plans that their oil tankers meet certain standards in the areas of tanker operations, personnel, management, technology and information reporting. In addition, Congress through the passage of OPA 90 § 1018 made clear that the states could regulate these areas in order to prevent oil spills. As in *Kleenwell*, the Washington oil spill prevention statutes and regulations do not directly regulate commerce in violation of the Commerce Clause.

There may still, however, be a Commerce Clause violation if the incidental burdens on interstate and foreign commerce imposed by the Washington rules are clearly excessive in relation to the putative local benefits." *Pacific Northwest Venison Producers*, 20 F.3d at 1012. Intertanko must show that the burdens that the regulations impose on interstate commerce "clearly outweigh" the local benefits. *Kleenwell*, 48 F.3d at 399.

Intertanko has not submitted sufficient evidence to make this showing.¹³ It asserts that the cost to date for a single tanker operator to develop, file and maintain an oil spill prevention plan has been about \$12,000 and that the cost of

13. Intertanko also argues that because this matter concerns international commerce, the Court must give additional scrutiny to determine whether the regulations might impair uniformity where under federal law uniformity is essential. See *Pacific Northwest Venison Producers*, 20 F.3d at 1014. Intertanko's uniformity concern is, however, misplaced. Congress through OPA 90 § 1018 has clarified that additional state oil spill prevention regulations are appropriate.

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installing the emergency towing package required by the rules will be about \$80,000. These are relatively small amounts compared to the average operating cost of a tanker, which is between \$13.6 and \$19 million for U.S. flag tankers, and between \$8.4 and \$12 million for non-U.S. flag tankers.

The costs of implementing a plan are also quite small when compared to the cost of an oil spill. The state reports that the estimated average cost of clean-up for four major oil spills in Washington between 1984 and 1988 was \$6.3 million, and that the estimated impact on natural resources for each spill ranged between \$2.2 and \$8.1 million.

Given the relatively minimal cost of compliance as compared to the cost of an oil spill, Intertanko cannot demonstrate that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the benefit offered by the oil spill prevention statutes and regulations. This benefit is derived from the state's promulgation of what all agree to be more stringent and protective regulations. Moreover, because of the wide disparity in costs associated with prevention as compared to the impact of an oil spill, only a slight amount of additional protection need be achieved for the statutory scheme to have succeeded. As a result, Intertanko has not presented sufficient facts to prove an inequitable balance such that a Commerce Clause violation is present.¹⁴

14. The Court recognizes that defendants and intervenors did not in their motions for summary judgment address the Commerce Clause claim. They did, however, argue in response to Intertanko's motion for summary judgment that the Commerce Clause claim could

(Cont'd)

*Appendix B***C. Foreign Affairs Clause.**

Intertanko also argues that the Washington oil spill prevention rules violate the Foreign Affairs Clause of the Constitution because they allow the state to contravene important international treaty agreements, and interfere with the federal government's ability to enter into such agreements. State regulations may not impair the effective exercise of the nation's foreign policy. *Zschernig v. Miller*, 389 U.S. 429, 440, 88 S.Ct. 664 (1968) (invalidating Oregon statutes that prevented foreign heirs from receiving property depending on the judgment of the state as to the propriety of the foreign country's domestic law). Thus "any state law that involves the state in the actual conduct of foreign affairs is unconstitutional." *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. (1990), *cert. denied*, 501 U.S. 1212 (1991)).

It is rare, however, that a state statute is invalidated because it intrudes into the area of foreign affairs. *Id.* ("[o]n only one occasion has the Supreme Court struck down a state statute as violative of the foreign relations power"). This is not such a case. Washington State is not acting in the federal

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not be sustained. And in arguing the merits of the Commerce Clause claim, no party asserted the presence of genuine issues of material fact. As a result, the Court construes the arguments of defendants and intervenors to be akin to cross-motions for summary judgment. Moreover, settled precedent allows the entry of summary judgment to a non-moving party. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 313 (9th Cir. 1982). The Court reaches the same conclusion with regard to Intertanko's extraterritorial claim. *See Infra*, at 31-33.

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government's place vis-a-vis a foreign or international body, but is instead exercising its police power by regulating both foreign and domestic tankers to protect the environment. Moreover, the state's decisions in this area are not keyed to any judgment as to the worthiness of a foreign regime. See *Trojan*, 916 F.2d at 903. Intertanko's Foreign Affairs Clause challenge cannot be sustained.

D. Extraterritorial Impact of Regulations.

Intertanko argues that the regulations impose obligations on tanker operators that go beyond the three-mile limit of Washington territorial waters, which is set by the Washington Constitution. Wash. Const. Art. XXIV, § 1 (setting state boundaries). It relies on *State v. Pollock*, 136 Wash. 25, 29 (1925), which confirmed that "the jurisdiction and dominion of the state extends to the three-mile limit off shore as defined in the constitution . . ."

The Washington statutes and regulations at issue by definition regulate tanker operations in Washington waters. The legislature made it unlawful for a covered vessel to operate in Washington waters without an approved prevention plan. RCW 88.46.080, .090. Owners and operators must submit prevention plans for their tank vessels. RCW 88.46.040(1). A Tank vessel, in turn, is defined as a ship that carries oil and that "[o]perates on the waters of the state." RCW 88.46.010. There is accordingly no direct assertion of jurisdiction over vessels outside of Washington waters.

Intertanko objects, however, to the incidental effects of the regulations. It objects to the requirements that owners report hazardous events even if the events occur outside of

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Washington, that owners use a bridge resource management system while in Washington waters that is the standard for the vessels in its fleet that operate in Washington¹⁵, that certain crew training and drill programs be conducted, that certain personnel evaluation and record keeping requirements be administered, and that certain owner and operations management programs be followed. The Court agrees with the state, however, that while some of these activities are likely to occur outside of Washington, such occurrences are not mandated.

Moreover, the Supreme Court has upheld state police power regulations that incidentally and indirectly affect interstate or foreign commerce outside of state waters. See *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 426, 56 S.Ct. 513 (1936) (denying challenge to California law restricting the use of sardines caught outside of state waters). In addition, the Washington Supreme Court has upheld the authority of the state to prohibit the possession or transportation of salmon taken from beyond the state's three-mile limit. *Frach v. Schoettler*, 46 Wash.2d 281, 290, *cert. denied*, 350 U.S. 838 (1955).¹⁶ Although these cases deal with fisheries rather than

15. The bridge resource management system must be standard practice throughout the owner's or operator's fleet." WAC 317-21-200(2). " 'Fleet' means more than one tank vessel operated by the same owner or operator." WAC 317-21-060(5). "Tank vessel" means a ship that carries oil and that "[o]perates on the waters of the state." WAC 317-21-060(11). Thus application of the bridge resource management system to the "fleet" affects only those vessels that operate in Washington.

16. Intervenor's point out that 16 U.S.C. § 1856(a)(3) now prohibits a state from "directly or indirectly regulat[ing] any fishing
(Cont'd)

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the prevention of oil pollution, the principle remains the same. Some incidental impact on extraterritorial activities is permitted to protect state resources. Intertanko's extraterritorial challenge falls short.

III. Conclusion

The Court concludes that the Washington oil spill prevention statutes and regulations are constitutionally valid. These statutes and regulations are not preempted by federal law, do not violate the Commerce Clause or the Foreign Affairs Clause of the Constitution, and are not improper extraterritorial restrictions. Rather, the oil spill prevention laws legitimately protect Washington's delicate and valuable marine resources through the exercise of the state's police powers.

Therefore, the motions for summary judgment filed by defendants and intervenors are GRANTED and the motion for summary judgment filed by Intertanko is DENIED. This action is hereby DISMISSED and the Clerk of the Court is directed to enter judgment accordingly.¹⁷

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vessel outside its boundaries, unless the vessel is registered under the law of that State." No similar proscription has been placed on the state's ability to prevent pollution. Rather, OPA 90 has made clear that states have authority to issue oil spill prevention regulations.

17. The issues raised in defendant Krider's motion for summary judgment were previously ruled on by the Court in the July 3, 1996 Order denying his motion to dismiss. Accordingly, his motion for summary judgment is DENIED. Plaintiff Intertanko's motion to supplement the summary judgment record is GRANTED.

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SO ORDERED this 18th day of November, 1996.

s/ John C. Coughenour
John C. Coughenour
United States District Judge

**APPENDIX C — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
DATED AND FILED NOVEMBER 24, 1998
FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE INTERNATIONAL ASSOCIATION OF
INDEPENDENT TANKER OWNERS
(INTERTANKO),

Plaintiff-Appellant,
and

UNITED STATES OF AMERICA,
Intervenor-Appellant,
v.

GARY LOCKE, Governor of the
State of Washington; CHRISTINE O.
GREGOIRE, Attorney General of the
State of Washington; BARBARA J.
HERMAN, Administrator of the
State of Washington Office of
Marine Safety; DAVID
MACEACHERN, Prosecutor of
Whatcom County; K. CARL LONG,
Prosecutor of Skagit County;
JAMES H. KRIDER, Prosecutor of
Snohomish County; NORMAN
MALENG, Prosecutor of King
County,

Defendants-Appellees,
and

NATURAL RESOURCES DEFENSE
COUNCIL; WASHINGTON
ENVIRONMENTAL COUNCIL; OCEAN
ADVOCATES,

Intervenors-Appellees.

No. 97-35010

D.C. No.
CV-95-01096-JCC
ORDER

Filed November 24, 1998

Appendix C

Before: James R. Browning and Diarmuid F. O'Scannlain,
Circuit Judges, and Alfredo C. Marquez,* District Judge.

ORDER; Dissent by Judge Graber

ORDER

The panel has unanimously voted to deny the petitions for rehearing. Judge Browning and Judge O'Scannlain have voted to reject the suggestions for rehearing en banc, and Judge Marquez so recommends.

The full court was advised of the suggestions for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

GRABER, Circuit Judge, dissenting:

I respectfully dissent from the court's decision not to rehear this case en banc.

This is the first published appellate decision interpreting the preemptive effect of the Oil Pollution Act of 1990 (OPA 90). The preemptive effect of OPA 90 is an issue of exceptional importance to the coastal states within the Ninth Circuit. *See* Fed. R. App. P. 35(a)(2) (providing that en banc consideration

*The Honorable Alfredo C. Marquez, Senior Judge, United States District Court for the District of Arizona, sitting by designation.

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is appropriate "when the proceeding involves a question of exceptional importance").¹

Additionally, although I do not suggest that the Washington regulations necessarily are invalid, the opinion's analysis is incorrect in two exceptionally important respects: (1) The

¹See also Sarah A. Loble, *Intertanko v. Lowry: An Assessment of Concurrent State and Federal Regulation Over State Waters*, 10 U.S.F. Mar. L.J. 27, 72 (1997) ("The Ninth Circuit has the opportunity to remedy the imbalance created by the district court, which favored Washington state regulation at the expense of federal interests."); Charles L. Coleman, III, *Federal Preemption of State "BAP" Laws: Repelling State Borders in the Interest of Uniformity*, 9 U.S.F. Mar. L.J. 305, 356 (1997) ("To the extent that the recent decision of the U.S. District Court for the Western District of Washington in *Intertanko v. Lowry* is inconsistent with the foregoing conclusions, it is wrong in this author's view, and should be overturned in the pending appeal to the Ninth Circuit Court of Appeals.") (footnote omitted); Robert E. Falvey, *A Shot Across the Bow: Rhode Island's Oil Spill Pollution Prevention and Control Act*, 2 Roger Williams U.L. Rev. 363, 396 (1997) ("The court attempted to counter *Intertanko*'s preemption argument by simply asserting that *Intertanko*'s theory was largely foreclosed by the nonpreemptive language of OPA '90. In light of the preceding discussion this reasoning seems unpersuasive.") (citation, footnote, and internal quotation marks omitted); Matthew P. Harrington, *Necessary and Proper, but Still Unconstitutional: The Oil Pollution Act's Delegation of Admiralty Power to the States*, 48 Case W. Res. L. Rev. 1, 17 n.59 (1997) ("Congress seems to have had a somewhat more restrictive view of what was being preempted than did the district court in *Intertanko*."); Michael P. Mullahy, *States' Rights and the Oil Pollution Act of 1990: A Sea of Confusion?*, 25 Hofstra L. Rev. 607, 636-37 (1996) ("The issue of whether Washington state has the power to enact the BAP Standards will most likely be decided by the Supreme Court [T]he Washington BAP Standards should survive the constitutional analysis the Court will most likely perform.") (footnote omitted); Laurie L. Crick, *The Washington State BAP Standards: A Case Study in Aggressive Tanker Regulation*, 27 J. Mar. L. & Com. 641, 646 (1996) ("[I]t is possible that most, if not all, of the BAP Standards will be upheld."); Marva Jo Wyatt, *Navigating the Limits of State Spill Regulations: How Far Can They Go?*, 8 U.S.F. Mar. L.J. 1, 26 (1995) ("The current controversy over Washington's navigational regulations affecting oil pollution implicates some of the most fundamental principles of our republic and foreshadows an age-old conflict between federalism and states' rights.").

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opinion places too much weight on two clauses in Title I of OPA 90 that limit OPA 90's preemptive effect. (2) Portions of the opinion that discuss the Coast Guard regulations are inconsistent with Ninth Circuit and Supreme Court precedent. Those issues warrant en banc consideration even if the opinion's ultimate result proves to be correct, a question as to which I express no view.

APPLICATION OF OPA 90'S PREEMPTION CLAUSES

Congress enacted OPA 90 in response to the Exxon Valdez oil spill. OPA 90 combined numerous bills into one comprehensive Act with nine titles. Title IV contains measures designed, in part, to *prevent* oil spills, while Title I regulates *liability and compensation* for oil spills. Congress placed the two pertinent preemption provisions in Title I. Those provisions state:

Nothing in this Act or the Act of March 3, 1851 shall—

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such a discharge; or

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.

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Section 1018(a) of OPA 90 (codified at 33 U.S.C. § 2718(a)).

Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof —

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil.

Section 1018(c) of OPA 90 (codified at 33 U.S.C. § 2718(c)).

The opinion reasons that the “plain language” of those pre-emption clauses indicates that Congress intended for them to apply to the oil spill prevention measures in Title IV. *See The International Assoc. of Indep. Tanker Owners (Intertanko) v. Locke*, 148 F.3d 1053, 1060 (9th Cir. 1998) (“By its plain language, § 1018 applies not only to Title I but to the other eight Titles of OPA 90 as well.”). *See also Sloan v. West*, 140 F.3d 1255, 1261 (9th Cir. 1998) (“If the intent of Congress is clear from the face of the statutory language, we must give effect to the unambiguously expressed Congressional intent.”). The opinion bases its “plain language” holding on Congress’ use of the term “this Act” in discussing the reach of the clauses. *Intertanko*, 148 F.3d at 1060. That reasoning is incomplete.

The term “this Act” does plainly indicate Congress’ intention to embrace all of OPA 90. However, examining the term “this Act” does not end the analysis. Grammatically, because

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of its placement in the sentences that comprise the preemption clauses, the term says only that “[n]othing in this Act” shall affect certain things — but we still must consider the meaning of those certain things that “[n]othing in this Act” is allowed to affect. At their broadest, the preemption clauses provide that “[n]othing in this Act . . . shall in any way affect . . . the authority of . . . any State . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil.” § 1018(c).

That phrase, read as a whole, is ambiguous, because it plausibly can be understood in two ways. One plausible way to read the phrase is that any state regulation designed to prevent an oil spill is a “requirement[] . . . relating to the discharge, or substantial threat of a discharge, of oil,” because in the broadest sense a preventive measure “relates” to the thing being prevented. Another plausible way to read the phrase, however, is to embrace only state regulations that impose “requirements” pertaining specifically “to the discharge, or substantial threat of a discharge, of oil” once it has occurred. That is, if a discharge is being prevented, there never comes into being a “discharge, or substantial threat of a discharge, of oil.” Under the latter, narrower reading, a preventive measure does not relate to an oil “discharge, or substantial threat of a discharge,” because its very purpose is to *avert* an oil discharge, or substantial threat of discharge, and the specified condition of the sentence is never met.

In summary, Congress could have intended to allow any state regulation that might prevent an oil spill, or Congress could have intended a more limited reach. The opinion acknowledges the ambiguity in this provision, which it resolves by analyzing the objectives of Congress. *See Inter-tanko*, 148 F.3d at 1060 n.6 (“Like the phrase ‘relating to’ employed in § 1018(c), the phrase ‘with respect to’ used in § 1018(a) is clearly expansive. However, we decline to read § 1018’s language according to its terms . . . since, as many a curbstone philosopher has observed, everything is related to

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everything else. Rather, in determining whether state oil-spill prevention laws 'respect' or 'relate to' the 'discharge of oil,' we must look to the objectives of OPA 90. Because one of the explicit objectives of OPA 90 is oil-spill prevention, § 1018 prevents anything in OPA 90 from preempting state laws in this field.") (citations and internal quotation marks omitted).

Contextual clues suggest, however, that Title I's preemption clauses do not apply to Title IV's prevention provisions. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1198 (9th Cir. 1998) ("the meaning of statutory language, plain or not, depends on context") (citation and internal quotation marks omitted), *cert. denied*, 1998 WL 467389 (U.S. Nov. 9, 1998) (No. 98-237). First, Congress placed these preemption clauses in a Title that addresses only *liability and compensation* for oil spills that actually occur. That placement (especially considering the full wording of the clauses) suggests that Congress intended for the clauses to apply only to the provisions in that Title. A second contextual clue strengthens that inference: A separate section in Title IV contains its own preemption clause. See § 4202(c) (Title IV), codified at 33 U.S.C. § 1321(o)(2).² Moreover, sections in other Titles of OPA 90 include their own preemption provisions as well. See § 5002(n) (Title V), codified at 33 U.S.C. § 2732;³ § 8202

²In section 4202(c), OPA 90 amended 33 U.S.C. § 1321(o)(2), a preexisting provision of the Federal Water Pollution Control Act. The amendment is emphasized below.

Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State, *or with respect to any removal activities related to such discharge.*

³Section 5002(n) provides in part:

Nothing in this section shall be construed as modifying, repealing, superseding, or preempting any municipal, State or Federal law or regulation, or in any way affecting litigation arising from oil spills or the rights and responsibilities of the United States or the State of Alaska, or municipalities thereof, to preserve and protect the environment through regulation of land, air, and water uses, of safety, and of related development.

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(Title VIII), codified at 43 U.S.C. § 1656(e).⁴ There would have been little or no need for additional preemption clauses if the clauses in Title I were comprehensive. Indeed, the opinion's broad reading of the preemption clauses in § 1018 would render the other OPA 90 preemption provisions largely superfluous, a result that this court generally avoids. See *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996) ("We have long followed the principle that statutes should not be construed to make surplusage of any provision.") (citation and internal quotation marks omitted).

Context, however, does not resolve the textual ambiguity definitively. In the face of an ambiguity not resolved by examining text and context, this court generally turns to a statute's legislative history. See *Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998), *as amended* 1998 WL 727476, at *3 (9th Cir. Oct. 20, 1998) (in construing a federal statute's preemptive effect, noting the general principle that resort to legislative history is appropriate when Congress' intent is not clear from an examination of the statutory text). See also *Moyle v. Director, Office of Workers' Compensation Programs*, 147 F.3d 1116, 1120 (9th Cir. 1998) ("[I]f the statute is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation.") (citation and internal quotation marks omitted). Here, the legislative history is of value.

⁴Section 8202(e) provides:

(1) Nothing in this section shall be construed or interpreted as preempting any State or political subdivision thereof from imposing any additional liability or requirements with respect to the discharge, or threat of discharge, of oil or other pollution by oil.

(2) Nothing in this section shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to discharges of oil.

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OPA 90's preemption clauses originated in the Senate's Oil Pollution Liability and Compensation Bill of 1989.⁶ The Sen-

⁶The original draft provided:

(a) Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such State. Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to discharges of oil.

(b) Nothing in this Act or in section 9507 of the Internal Revenue Code of 1954 shall in any way affect, or be construed to affect, the authority of any State—

(1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or

(2) to require any person to contribute to such a fund.

(c) A State may enforce, on the navigable waters of such State, the requirements for evidence of financial responsibility applicable under section 104 of this Act.

(d) The President shall consult with the affected State or States on the appropriate removal action to be taken. Removal with respect to any discharge or incident shall be considered completed when so determined by the President and the Governor or Governors of the affected State or States.

(e) Nothing in this Act, the Act of March 3, 1851, as amended (46 U.S.C. 183 et seq.), or section 9507 of the Internal Revenue Code of 1954, shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law, relating to the discharge, or substantial threat of a discharge, of oil.

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ate intended for that bill to "consolidate and improve Federal laws providing compensation and establishing liability for oil spills." S. Rep. No. 101-94, at 1 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723. That bill did not include Title IV's oil pollution prevention provisions at all. *See* 135 Cong. Rec. S3241-46 (daily ed. Apr. 4, 1989).

The Senate drafted a separate bill, the Oil Tanker Navigation Safety Bill of 1989, that included provisions regarding the prevention of oil spills, including some provisions similar to those that eventually appeared in Title IV. *See* S. Rep. No. 101-99, 3-4 (1989), *reprinted in* 1990 U.S.C.C.A.N. 752.⁶ That bill contained its own preemption clause. *See* 135 Cong. Rec. S9332 (daily ed. Aug. 2, 1989).⁷ *See also* S. Rep. No. 101-99, at 21, *reprinted in* 1990 U.S.C.C.A.N. at 770.

The Senate added some of the preventive provisions from the Oil Tanker Navigation Safety Bill to the Oil Pollution Liability and Compensation Bill. *See* 135 Cong. Rec. S9678 (daily ed. Aug. 3, 1989); 135 Cong. Rec. S10406-07 (daily ed. Aug. 15, 1989). Specifically, the Senate added the provisions relating to alcohol testing and crew placement, which it put in Title III. *See* 135 Cong. Rec. S10406. The Senate also added the preemption clause from the Oil Tanker Navigation Safety Bill to that Title (§ 310), and it limited the reach of the preemption clause to the oil spill prevention provisions in that Title. *See id.* at S10415-S10417.⁸ That modified bill did not

⁶Specifically, Title III of that bill included provisions requiring (a) alcohol testing of tanker personnel and (b) the placement of four crew members on the navigation bridge of a tanker. *Id.*

⁷That clause provided:

Nothing in this Act shall be construed or interpreted as changing, diminishing, or preempting in any way the authority of a State, or any political subdivision thereof, to regulate oil tankers or to provide for oil spill liability or contingency response planning and activities in State waters.

⁸Section 310 provided:

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alter the Oil Pollution Liability and Compensation Bill's pre-existing preemption clauses found in the oil spill *liability and compensation* title of the amended bill (Title I, Section 106). *Id.* at S10412.

Although the Senate's final bill contained some oil spill prevention measures, Title IV originated in the House of Representatives in the Oil Pollution, Prevention, Response, Liability and Compensation Bill of 1989. In drafting that bill, the House generally chose to preempt, rather than to allow, state regulation. *See* Congressional Quarterly Almanac, 102d Cong., 2d Sess., p. 283 (1990) (noting the "House's insistence on a provision to pre-empt strict state laws"). Specifically, the House's preemption provision allowed states only to establish or maintain an oil spill fund and "to impose, or to determine the amount of, any fine or penalty." *See* Cong. Rec., 101st Cong., Vol. 135, part 20, 27827, 27947 (bound ed. Nov. 8, 1989).⁹

Nothing in this title shall be construed or interpreted as changing, diminishing, or preempting in any way the authority of a State, or any political subdivision thereof, to regulate oil tankers in State waters.

Id. at S10417.

⁹Section 1018 of the House version provided:

(a) PREEMPTION

(1) ACTIONS PREEMPTED. — Except as provided in this Act and the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), no action arising out of a discharge of oil, or a substantial threat of a discharge of oil, from a vessel or facility into or upon the navigable waters or adjoining shorelines or the exclusive economic zone (other than an action for personal injury or wrongful death), may be brought in any court of the United States or of any State or political subdivision thereof.

(2) STATE FUNDS AND ACCOUNTS. — Nothing in this Act or in sections 4611 and 9509 of the Internal Revenue Code of 1986 shall affect the authority of any State (A) to establish or

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After vigorous debate, the House eventually amended its preemption provisions and adopted wording similar to that found in the Senate's § 106 preemption clauses.¹⁰ See 135 Cong. Rec. H8165 (daily ed. Nov. 8, 1989). However, the debate made clear that the House intended for the preemption

continue in effect an oil spill fund or account; or (B) to require any person to contribute to that fund or account.

(b) **NO PREEMPTION OF PENALTIES.** — Nothing in this Act or section 9509 of the Internal Revenue Code of 1986 shall affect the authority of the United States or any State or political subdivision thereof to impose, or to determine the amount of, any fine or penalty for any violation of law relating to an incident.

(c) **LIMITATION OF LIABILITY ACT.** — The Act of March 3, 1851, shall not apply to removal costs and damages that directly result from an incident involving the discharge or substantial threat of discharge of oil.

¹⁰The amended House version of § 1018 provides in part:

(a) **PRESERVATION OF STATE AUTHORITIES.** —

(1) Notwithstanding any other provision, nothing in this Act or the Act of March 3, 1851 shall—

(A) be construed or interpreted as preempting any state or political subdivision thereof from imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such state; or

(B) affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or state law, including common law.

(2) Nothing in this Act or in sections 4611 or 9509 of the Internal Revenue Code of 1986 shall affect or be construed to affect the authority of any state or political subdivision thereof—

(A) to establish or to continue in effect a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or

(B) to require any person to contribute to such a fund.

135 Cong. Rec. 156 H8128-29 (daily ed. Nov. 8, 1989).

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clauses to apply only to OPA 90's oil spill *liability and compensation* provisions. Compare *id.* at H8129 (Nov. 8, 1989) (statement of Rep. Miller) ("The amendment that I am offering on behalf of myself and the gentleman from Massachusetts [Mr. Studds] is an amendment to correct a glaring flaw in H.R. 1465, by preserving the rights of States to set higher standards for *oil pollution liability* and more complete systems of *compensation* than are allowed under this bill or under current law.") (emphasis added) with *id.* (statement of Rep. Hammerschmidt) ("I had thought that the issue of concern centered around whether *State liability laws* should be preempted. That is not the only issue presented by this amendment. This amendment goes much further. It would remove provisions in the bill addressing the need for a uniform system of *financial responsibility*. The system of *liability and compensation* in the bill is intended to be comprehensive and definite.") (emphasis added).

In summary, before Congress held its Conference Committee, the Senate had a bill with: (a) a preemption clause in its oil pollution liability and compensation title (Title I, § 106); and (b) some oil spill prevention provisions in Title III, which had their own specific preemption provision (§ 310). The House, where most of Title IV originated, had only one preemption provision (§ 1018), which was similar to the Senate's § 106 and which the House intended to apply only to oil spill liability and compensation.

The Conference Committee deleted the Senate's § 310 preemption clause that applied to oil spill prevention measures. Moreover, the Conference Committee relied only on the Senate's § 106 and the House's § 1018 when drafting the final preemption clauses. See H.R. Conf. Rep. No. 101-653, pp. 121-22 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 799-800 ("Section 106 of the Senate amendment and section 1018 of the House bill are generally similar provisions The Conference substitute blends the provisions of the House and Senate bills, and adds a new subsection (d) pertaining to the

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liability of Federal employees."').¹¹ The Conference Committee's deletion of the only preemption clause that applied specifically to oil spill prevention, and its reliance instead on two provisions that never applied to prevention provisions, together suggest that Congress did not intend its final version of § 1018 to apply to OPA 90's oil spill prevention provisions (Title IV).

Under all the circumstances, Congress' choice of wording and its decision to place the preemption clauses in Title I suggest that it intended for those clauses to apply only to Title I and its liability and compensation provisions. *See, e.g., National Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp.*, 924 F. Supp. 1436, 1448 (E.D. Va. 1996) ("The purpose behind the savings clause is to allow the states to impose liability upon oil polluters above the liability imposed through OPA. Congress wanted to give the states the power to force polluters to cleanup completely oil spills and to compensate the victims of oil spills, even if their liability for these remediation expenses is limited under OPA."), *aff'd*, 122 F.3d 1062 (4th Cir. 1997) (Table), *cert. denied*, 118 S. Ct. 1301 (1998). The opinion's method of analyzing Congress' intent is incomplete and, thus, the opinion's conclusion fails accurately to identify that intent.

PREEMPTIVE EFFECT OF COAST GUARD REGULATIONS

Relying on *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), the *Intertanko* opinion refuses to give preemptive effect to various Coast Guard regulations, because (1) Congress did not expressly delegate to the Coast Guard the power to preempt state law, and (2) OPA 90's preemption clauses implied the opposite Congressional intent. *See Intertanko*, 148

¹¹The Conference Committee also indicated its intent "not to disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978)." *Id.*

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F.3d at 1068 (“Congress did not explicitly or impliedly delegate to the Coast Guard the authority to preempt state law. Indeed, § 1018 of OPA 90 establishes that nothing in OPA 90 may be construed as impairing the ability of the states to impose their own oil-spill prevention requirements. In view of Congress’s unwillingness to preempt state oil-spill prevention efforts on its own, we find implausible the argument that it intended to delegate power to the Coast Guard to do so.”) (citations and footnote omitted) (emphasis added). That analysis is inconsistent with Ninth Circuit and Supreme Court precedent.

Generally, an administrative agency’s regulations have preemptive effect whenever Congress has authorized the agency to enact such regulations, not merely when Congress expressly has authorized the agency to preempt state law. See *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (“[A] preemptive regulation’s force does not depend on express congressional authorization to displace state law. Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.”) (citation and internal quotation marks omitted); *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (making the same point).

Louisiana Pub. Serv. Comm’n is not to the contrary. There, the Supreme Court refused to give preemptive effect to an administrative agency’s regulations, because Congress had expressly denied the administrative agency the power to enact the regulations. See 47 U.S.C. § 152(b) (“[N]othing in this chapter shall be construed to apply to or give the Commission [FCC] jurisdiction with respect to . . . intrastate communication service.”); *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 360 (“[T]he Act grants to the FCC the authority to regulate interstate and foreign commerce in wire and radio communi-

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cation, while expressly denying that agency jurisdiction with respect to . . . intrastate communication service.") (citation and internal quotation marks omitted).

By contrast, OPA 90 did not deny the Coast Guard power to enact the regulations at issue here. Rather, Congress "required the Coast Guard to implement a wide range of oil-spill prevention rules" when it passed OPA 90. *Intertanko*, 148 F.3d at 1068 (emphasis added). See 33 U.S.C. §§ 2701-18 (so providing). Because the Coast Guard acted within its authority when it enacted the regulations, those regulations can have preemptive effect, even though Congress did not expressly authorize the Coast Guard to preempt state law.

OPA 90's preemption clauses, allowing for some state involvement, do not alter that analysis. In *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), this court similarly faced a Congressional statute that allowed state involvement. *Id.* at 489 ("The above authorities demonstrate a congressional intent that there be joint federal/state regulation of ocean waters within three miles of shore."). Even though Congress had allowed state involvement, this court still analyzed whether the Coast Guard's regulations preempted state law. See *id.* at 499 ("Although we conclude that the objectives of the Alaska statute do not conflict with those of the Coast Guard regulations . . ., we must nevertheless determine whether the facts of this case as alleged or conceded by appellees reveal an irreconcilable conflict when the Alaska statute and Coast Guard regulations are applied concurrently in Alaska territorial waters."). *Accord Beveridge v. Lewis*, 939 F.2d 859, 864 (9th Cir. 1991). In summary, the opinion's treatment of the regulations is inconsistent with precedent.

CONCLUSION

For the foregoing reasons, I dissent from the court's decision to decline the suggestion for a rehearing en banc.

APPENDIX D — CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 3. Regulation of Commerce

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

Article II, Section 2, Clause 2. Treaty Making Power; Appointing Power

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * *

Article VI, Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * *

APPENDIX E — RELEVANT STATUTES

26 U.S.C. § 9509

§ 9509. Oil Spill Liability Trust Fund

(a) Creation of Trust Fund. — There is established in the Treasury of the United States a trust fund to be known as the “Oil Spill Liability Trust Fund”, consisting of such amounts as may be appropriated or credited to such Trust Fund as provided in this section or section 9602(b).

(b) Transfers to Trust Fund. — There are hereby appropriated to the Oil Spill Liability Trust Fund amounts equivalent to —

(1) taxes received in the Treasury under section 4611 (relating to environmental tax on petroleum) to the extent attributable to the Oil Spill Liability Trust Fund financing rate under section 4611(c),

(2) amounts recovered under the Oil Pollution Act of 1990 for damages to natural resources which are required to be deposited in the Fund under section 1006(f) of such Act,

(3) amounts recovered by such Trust Fund under section 1015 of such Act,

(4) amounts required to be transferred by such Act from the revolving fund established under section 311(k) of the Federal Water Pollution Control Act,

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(5) amounts required to be transferred by the Oil Pollution Act of 1990 from the Deepwater Port Liability Fund established under section 18(f) of the Deepwater Port Act of 1974,

(6) amounts required to be transferred by the Oil Pollution Act of 1990 from the Offshore Oil Pollution Compensation Fund established under section 302 of the Outer Continental Shelf Lands Act Amendments of 1978,

(7) amounts required to be transferred by the Oil Pollution Act of 1990 from the Trans-Alaska Pipeline Liability Fund established under section 204 of the Trans-Alaska Pipeline Authorization Act, and

(8) any penalty paid pursuant to section 311 of the Federal Water Pollution Control Act, section 309(c) of such Act (as a result of violations of such section 311), the Deepwater Port Act of 1974, or section 207 of the Trans-Alaska Pipeline Authorization Act.

(c) Expenditures. —

(1) Expenditure purposes. — Amounts in the Oil Spill Liability Trust Fund shall be available, as provided in appropriation Acts or section 6002(b) of the Oil Pollution Act of 1990, only for purposes of making expenditures —

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(A) for the payment of removal costs and other costs, expenses, claims, and damages referred to in section 1012 of such Act,

(B) to carry out sections 5 and 7 of the Intervention on the High Seas Act relating to oil pollution or the substantial threat of oil pollution,

(C) for the payment of liabilities incurred by the revolving fund established by section 311(k) of the Federal Water Pollution Control Act,

(D) to carry out subsections (b), (c), (d), (j), and (l) of section 311 of the Federal Water Pollution Control Act with respect to prevention, removal, and enforcement related to oil discharges (as defined in such section),

(E) for the payment of liabilities incurred by the Deepwater Port Liability Fund, and

(F) for the payment of liabilities incurred by the Offshore Oil Pollution Compensation Fund.

*Appendix E***(2) Limitations on expenditures. —**

(A) \$1,000,000,000 per incident, etc. — The maximum amount which may be paid from the Oil Spill Liability Trust Fund with respect to —

(i) any single incident shall not exceed \$1,000,000,000, and

(ii) natural resource damage assessments and claims in connection with any single incident shall not exceed \$500,000,000.

(B) \$30,000,000 minimum balance. — Except in the case of payments of removal costs, a payment may be made from such Trust Fund only if the amount in such Trust Fund after such payment will not be less than \$30,000,000.

(d) Authority to borrow. —

(1) In general. — There are authorized to be appropriated to the Oil Spill Liability Trust Fund, as repayable advances, such sums as may be necessary to carry out the purposes of such Trust Fund.

*Appendix E***(2) Limitation on amount outstanding. —**

The maximum aggregate amount of repayable advances to the Oil Spill Liability Trust Fund which is outstanding at any one time shall not exceed \$1,000,000,000.

(3) Repayment of advances. —

(A) In general. — Advances made to the Oil Spill Liability Trust Fund shall be repaid, and interest on such advances shall be paid, to the general fund of the Treasury when the Secretary determines that moneys are available for such purposes in such Fund.

(B) Final repayment. — No advance shall be made to the Oil Spill Liability Trust Fund after December 31, 1994, and all advances to such Fund shall be repaid on or before such date.

(C) Rate of interest. — Interest on advances made pursuant to this subsection shall be —

(i) at a rate determined by the Secretary of the Treasury (as of the close of the calendar month preceding the month in which the advance is made) to be equal to the current average

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market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the anticipated period during which the advance will be outstanding, and

(ii) compounded annually.

(e) Liability of the United States limited to amount in Trust Fund. —

(1) General rule. — Any claim filed against the Oil Spill Liability Trust Fund may be paid only out of such Trust Fund.

(2) Coordination with other provisions. — Nothing in the Oil Pollution Act of 1990 (or in any amendment made by such Act) shall authorize the payment by the United States Government of any amount with respect to any such claim out of any source other than the Oil Spill Liability Trust Fund.

(3) Order in which unpaid claims are to be paid. — If at any time the Oil Spill Liability Trust Fund has insufficient funds (or is unable by reason of subsection (c)(2)) to pay all of the claims out of such Trust Fund at such time, such claims shall, to the extent permitted under paragraph (1) and such subsection, be paid in full in the order in which they were finally determined.

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(f) References to Oil Pollution Act of 1990. — Any reference in this section to the Oil Pollution Act of 1990 or any other Act referred to in a subparagraph of subsection (c)(1) shall be treated as a reference to such Act as in effect on the date of the enactment of this subsection.

* * *

Ch. 25 PORTS AND WATERWAYS SAFETY

* * *

33 U.S.C. § 1223**§ 1223. Vessel operating requirements****(a) In general**

Subject to the requirements of section 1224 of this title, the Secretary —

(1) in any port or place under the jurisdiction of the United States, in the navigable waters of the United States, or in any area covered by an international agreement negotiated pursuant to section 1230 of this title, may construct, operate, maintain, improve, or expand vessel traffic services, consisting of measures for controlling or supervising vessel traffic or for protecting navigation and the marine environment and may include, but need not be limited to one or more of the following: reporting and operating

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requirements, surveillance and communications systems, routing systems, and fairways;

(2) shall require appropriate vessels which operate in an area of a vessel traffic service to utilize or comply with that service;

(3) may require vessels to install and use specified navigation equipment, communications equipment, electronic relative motion analyzer equipment, or any electronic or other device necessary to comply with a vessel traffic service or which is necessary in the interests of vessel safety: *Provided*, That the Secretary shall not require fishing vessels under 300 gross tons as measured under section 14502 of title 46, United States Code, or an alternate tonnage measured under section 14302 of that title as prescribed by the Secretary under section 14104 of that title or recreational vessels 65 feet or less to possess or use the equipment or devices required by this subsection solely under the authority of this chapter;

(4) may control vessel traffic in areas subject to the jurisdiction of the United States which the Secretary determines to be hazardous, or under conditions of reduced visibility, adverse weather, vessel congestion, or other hazardous circumstances by —

(A) specifying times of entry, movement, or departure;

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(B) establishing vessel traffic routing schemes;

(C) establishing vessel size, speed, draft limitations and vessel operating conditions; and

(D) restricting operation, in any hazardous area or under hazardous conditions, to vessels which have particular operating characteristics or capabilities which he considers necessary for safe operation under the circumstances; and

(5) may require the receipt of prearrival messages from any vessel, destined for a port or place subject to the jurisdiction of the United States, in sufficient time to permit advance vessel traffic planning prior to port entry, which shall include any information which is not already a matter of record and which the Secretary determines necessary for the control of the vessel and the safety of the port or the marine environment.

(b) Special powers

The Secretary may order any vessel, in a port or place subject to the jurisdiction of the United States or in the navigable waters of the United States, to operate or anchor in a manner he directs if —

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(1) he has reasonable cause to believe such vessel does not comply with any regulation issued under this chapter or any other applicable law or treaty;

(2) he determines that such vessel does not satisfy the conditions for port entry set forth in section 1228 of this title; or

(3) by reason of weather, visibility, sea conditions, port congestion, other hazardous circumstances, or the condition of such vessel, he is satisfied that such directive is justified in the interest of safety.

(c) Port access routes

(1) In order to provide safe access routes for the movement of vessel traffic proceeding to or from ports or places subject to the jurisdiction of the United States, and subject to the requirements of paragraph (3) hereof, the Secretary shall designate necessary fairways and traffic separation schemes for vessels operating in the territorial sea of the United States and in high seas approaches, outside the territorial sea, to such ports or places. Such a designation shall recognize, within the designated area, the paramount right of navigation over all other uses.

(2) No designation may be made by the Secretary pursuant to this subsection, if such a

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designation, as implemented, would deprive any person of the effective exercise of a right granted by a lease or permit executed or issued under other applicable provisions of law: *Provided*, That such right has become vested prior to the time of publication of the notice required by clause (A) of paragraph (3) hereof: *Provided further*, That the determination as to whether the designation would so deprive any such person shall be made by the Secretary, after consultation with the responsible official under whose authority the lease was executed or the permit issued.

(3) Prior to making a designation pursuant to paragraph (1) hereof, and in accordance with the requirements of section 1224 of this title, the Secretary shall —

(A) within six months after date of enactment of this Act (and may, from time to time thereafter), undertake a study of the potential traffic density and the need for safe access routes for vessels in any area for which fairways or traffic separation schemes are proposed or which may otherwise be considered and shall publish notice of such undertaking in the Federal Register;

(B) in consultation with the Secretary of State, the Secretary of the Interior, the Secretary of Commerce, the

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Secretary of the Army, and the Governors of affected States, as their responsibilities may require, take into account all other uses of the area under consideration (including, as appropriate, the exploration for, or exploitation of, oil, gas, or other mineral resources, the construction or operation of deepwater ports or other structures on or above the seabed or subsoil of the submerged lands or the Outer Continental Shelf of the United States, the establishment or operation of marine or estuarine sanctuaries, and activities involving recreational or commercial fishing); and

(C) to the extent practicable, reconcile the need for safe access routes with the needs of all other reasonable uses of the area involved.

(4) In carrying out his responsibilities under paragraph (3), the Secretary shall proceed expeditiously to complete any study undertaken. Thereafter, he shall promptly issue a notice of proposed rule-making for the designation contemplated or shall have published in the Federal Register a notice that no designation is contemplated as a result of the study and the reason for such determination.

(5) In connection with a designation made pursuant to this subsection, the Secretary —

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(A) shall issue reasonable rules and regulations governing the use of such designated areas, including the applicability of rules 9 and 10 of the International Regulations for Preventing Collisions at Sea, 1972, relating to narrow channels and traffic separation schemes, respectively, in waters where such regulations apply;

(B) to the extent that he finds reasonable and necessary to effectuate the purposes of the designation, make the use of designated fairways and traffic separation schemes mandatory for specific types and sizes of vessels, foreign and domestic, operating in the territorial sea of the United States and for specific types and sizes of vessels of the United States operating on the high seas beyond the territorial sea of the United States;

(C) may, from time to time, as necessary, adjust the location or limits of designated fairways or traffic separation schemes, in order to accommodate the needs of other uses which cannot be reasonably accommodated otherwise: *Provided*, That such an adjustment will not, in the judgment of the Secretary, unacceptably

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adversely affect the purpose for which the existing designation was made and the need for which continues; and

(D) shall, through appropriate channels, (i) notify cognizant international organizations of any designation, or adjustment thereof, and (ii) take action to seek the cooperation of foreign States in making it mandatory for vessels under their control to use any fairway or traffic separation scheme designated pursuant to this subsection in any area of the high seas, to the same extent as required by the Secretary for vessels of the United States.

(d) Exception

Except pursuant to international treaty, convention, or agreement, to which the United States is a party, this chapter shall not apply to any foreign vessel that is not destined for, or departing from, a port or place subject to the jurisdiction of the United States and that is in —

(1) innocent passage through the territorial sea of the United States, or

(2) transit through the navigable waters of the United States which form a part of an international strait.

* * *

*Appendix E***33 U.S.C. § 1224****§ 1224. Considerations by Secretary**

In carrying out his duties and responsibilities under section 1223 of this title, the Secretary shall —

(a) take into account all relevant factors concerning navigation and vessel safety and protection of the marine environment, including but not limited to —

(1) the scope and degree of the risk or hazard involved;

(2) vessel traffic characteristics and trends, including traffic volume, the sizes and types of vessels involved, potential interference with the flow of commercial traffic, the presence of any unusual cargoes, and other similar factors;

(3) port and waterway configurations and variations in local conditions of geography, climate, and other similar factors;

(4) the need for granting exemptions for the installation and use of equipment or devices for use with vessel traffic services for certain classes

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of small vessels, such as self-propelled fishing vessels and recreational vessels;

(5) the proximity of fishing grounds, oil and gas drilling and production operations, or any other potential or actual conflicting activity;

(6) environmental factors;

(7) economic impact and effects;

(8) existing vessel traffic services;
and

(9) local practices and customs, including voluntary arrangements and agreements within the maritime community; and

(b) at the earliest possible time, consult with and receive and consider the views of representatives of the maritime community, ports and harbor authorities or associations, environmental groups, and other parties who may be affected by the proposed actions.

* * *

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33 U.S.C. § 1225

§ 1225. Waterfront safety

(a) In general

The Secretary may take such action as is necessary to —

(1) prevent damage to, or the destruction of, any bridge or other structure on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to such waters; and

(2) protect the navigable waters and the resources therein from harm resulting from vessel or structure damage, destruction, or loss. Such action may include, but need not be limited to —

(A) establishing procedures, measures, and standards for the handling, loading, unloading, storage, stowage, and movement on the structure (including the emergency removal, control, and disposition) of explosives or other dangerous articles and substances, including oil or hazardous material as those terms are defined in section 2101 of Title 46;

(B) prescribing minimum safety equipment requirements for the structure

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to assure adequate protection from fire, explosion, natural disaster, and other serious accidents or casualties;

(C) establishing water or waterfront safety zones, or other measures for limited, controlled, or conditional access and activity when necessary for the protection of any vessel, structure, waters, or shore area; and

(D) establishing procedures for examination to assure compliance with the requirements prescribed under this section.

(b) State law

Nothing contained in this section, with respect to structures, prohibits a State or political subdivision thereof from prescribing higher safety equipment requirements or safety standards than those which may be prescribed by regulations hereunder.

* * *

*Appendix E***33 U.S.C. § 1228****§ 1228. Conditions for entry to ports in the United States****(a) In general**

No vessel, subject to the provisions of chapter 37 of Title 46, shall operate in the navigable waters of the United States or transfer cargo or residue in any port or place under the jurisdiction of the United States, if such vessel —

(1) has a history of accidents, pollution incidents, or serious repair problems which, as determined by the Secretary, creates reason to believe that such vessel may be unsafe or may create a threat to the marine environment; or

(2) fails to comply with any applicable regulation issued under this chapter, chapter 37 of Title 46, or under any other applicable law or treaty; or

(3) discharges oil or hazardous material in violation of any law of the United States or in a manner or quantities inconsistent with the provisions of any treaty to which the United States is a party; or

(4) does not comply with any applicable vessel traffic service requirements; or

(5) is manned by one or more officers who are licensed by a certificating state which the

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Secretary has determined, pursuant to section 9101 of Title 46, does not have standards for licensing and certification of seafarers which are comparable to or more stringent than United States standards or international standards which are accepted by the United States; or

(6) is not manned in compliance with manning levels as determined by the Secretary to be necessary to insure the safe navigation of the vessel; or

(7) while underway, does not have at least one licensed deck officer on the navigation bridge who is capable of clearly understanding English.

(b) Exceptions

The Secretary may allow provisional entry of a vessel not in compliance with subsection (a) of this section, if the owner or operator of such vessel proves, to the satisfaction of the Secretary, that such vessel is not unsafe or a threat to the marine environment, and if such entry is necessary for the safety of the vessel or persons aboard. In addition, paragraphs (1), (2), (3), and (4) of subsection (a) of this section shall not apply if the owner or operator of such vessel proves, to the satisfaction of the Secretary, that such vessel is no longer unsafe or a threat to the marine environment, and is no longer in violation of any applicable law, treaty, regulation or condition, as appropriate. Clauses (5) and (6) of subsection (a) of this section shall become applicable eighteen months after October 17, 1978.

* * *

*Appendix E***33 U.S.C. § 1230****§ 1230. International agreements****(a) Transmittal of regulations**

The Secretary shall transmit, via the Secretary of State, to appropriate international bodies or forums, any regulations issued under this chapter, for consideration as international standards.

(b) Agreements

The President is authorized and encouraged to —

(1) enter into negotiations and conclude and execute agreements with neighboring nations, to establish compatible vessel standards and vessel traffic services, and to establish, operate, and maintain international vessel traffic services, in areas and under circumstances of mutual concern; and

(2) enter into negotiations, through appropriate international bodies, and conclude and execute agreements to establish vessel traffic services in appropriate areas of the high seas.

(c) Operations

The Secretary, pursuant to any agreement negotiated under subsection (b) of this section which is binding upon

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the United States in accordance with constitutional requirements, may —

(1) require vessels in the vessel traffic service area to utilize or to comply with the vessel traffic service, including the carrying or installation of equipment and devices as necessary for the use of the service; and

(2) waive, by order or regulation, the application of any United States law or regulation concerning the design, construction, operation, equipment, personnel qualifications, and manning standards for vessels operating in waters over which the United States exercises jurisdiction if such vessel is not en route to or from a United States port or place, and if vessels en route to or from a United States port or place are accorded equivalent waivers of laws and regulations of the neighboring nation, when operating in waters over which that nation exercises jurisdiction.

* * *

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SUBCHAPTER I — OIL POLLUTION LIABILITY
AND COMPENSATION

* * *

33 U.S.C. § 2701

§ 2701. Definitions

For the purposes of this chapter, the term —

(1) “act of God” means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight;

(2) “barrel” means 42 United States gallons at 60 degrees fahrenheit;

(3) “claim” means a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident;

(4) “claimant” means any person or government who presents a claim for compensation under this subchapter;

(5) “damages” means damages specified in section 2702(b) of this title, and includes the cost of assessing these damages;

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(6) "deepwater port" is a facility licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524);

(7) "discharge" means any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping;

(8) "exclusive economic zone" means the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983, including the ocean waters of the areas referred to as "eastern special areas" in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990;

(9) "facility" means any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes;

(10) "foreign offshore unit" means a facility which is located, in whole or in part, in the territorial sea or on the continental shelf of a foreign country and which is or was used for one

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or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the seabed beneath the foreign country's territorial sea or from the foreign country's continental shelf;

(11) "Fund" means the Oil Spill Liability Trust Fund, established by section 9509 of Title 26;

(12) "gross ton" has the meaning given that term by the Secretary under part J of Title 46 [46 U.S.C.A. § 14101 et seq.];

(13) "guarantor" means any person, other than the responsible party, who provides evidence of financial responsibility for a responsible party under this chapter;

(14) "incident" means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil;

(15) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians

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because of their status as Indians and has governmental authority over lands belonging to or controlled by the tribe;

(16) "lessee" means a person holding a leasehold interest in an oil or gas lease on lands beneath navigable waters (as that term is defined in section 1301(a) of Title 43) or on submerged lands of the Outer Continental Shelf, granted or maintained under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.);

(17) "liable" or "liability" shall be construed to be the standard of liability which obtains under section 1321 of this title;

(18) "mobile offshore drilling unit" means a vessel (other than a self-elevating lift vessel) capable of use as an offshore facility;

(19) "National Contingency Plan" means the National Contingency Plan prepared and published under section 1321(d) of this title, as amended by this Act, or revised under section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9605);

(20) "natural resources" includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to,

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or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government;

(21) "navigable waters" means the waters of the United States, including the territorial sea;

(22) "offshore facility" means any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(23) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act [42 U.S.C.A. § 9601 et seq.];

(24) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under,

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any land within the United States other than submerged land;

(25) the term "Outer Continental Shelf facility" means an offshore facility which is located, in whole or in part, on the Outer Continental Shelf and is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the Outer Continental Shelf;

(26) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, the vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(27) "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body;

(28) "permittee" means a person holding an authorization, license, or permit for geological exploration issued under section 11 of the Outer Continental Shelf Lands Act (43 U.S.C. 1340) or applicable State law;

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(29) "public vessel" means a vessel owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce;

(30) "remove" or "removal" means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(31) "removal costs" means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident;

(32) "responsible party" means the following:

(A) Vessels

In the case of a vessel, any person owning, operating, or demise chartering the vessel.

*Appendix E***(B) Onshore facilities**

In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(C) Offshore facilities

In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.

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(D) Deepwater ports

In the case of a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524), the licensee.

(E) Pipelines

In the case of a pipeline, any person owning or operating the pipeline.

(F) Abandonment

In the case of an abandoned vessel, onshore facility, deepwater port, pipeline, or offshore facility, the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility.

(33) "Secretary" means the Secretary of the department in which the Coast Guard is operating;

(34) "tank vessel" means a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that —

(A) is a vessel of the United States;

(B) operates on the navigable waters; or

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(C) transfers oil or hazardous material in a place subject to the jurisdiction of the United States;

(35) "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of 3 miles;

(36) "United States" and "State" mean the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession of the United States; and

(37) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel.

(Pub.L. 101-380, Title I, § 1001, Aug. 18, 1990, 104 Stat. 486.)

* * *

*Appendix E***33 U.S.C. § 2702****§ 2702. Elements of liability****(a) In general**

Notwithstanding any other provision or rule of law, and subject to the provisions of this chapter, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.

(b) Covered removal costs and damages**(1) Removal costs**

The removal costs referred to in subsection (a) of this section are —

(A) all removal costs incurred by the United States, a State, or an Indian tribe under subsection (c), (d), (e), or (f) of section 1321 of this title, as amended by this Act, under the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.), or under State law; and

(B) any removal costs incurred by any person for acts taken by the person

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which are consistent with the National Contingency Plan.

(2) Damages

The damages referred to in subsection (a) of this section are the following:

(A) Natural resources

Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.

(B) Real or personal property

Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

(C) Subsistence use

Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been

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injured, destroyed, or lost, without regard to the ownership or management of the resources.

(D) Revenues

Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.

(E) Profits and earning capacity

Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

(F) Public services

Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a

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State, or a political subdivision of a State.

(c) Excluded discharges

This subchapter does not apply to any discharge —

(1) permitted by a permit issued under Federal, State, or local law;

(2) from a public vessel; or

(3) from an onshore facility which is subject to the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.).

(d) Liability of third parties

(1) In general

(A) Third party treated as responsible party

Except as provided in subparagraph (B), in any case in which a responsible party establishes that a discharge or threat of a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 2703(a)(3) of this title (or solely by such an act or omission in combination with

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an act of God or an act of war), the third party or parties shall be treated as the responsible party or parties for purposes of determining liability under this subchapter.

(B) Subrogation of responsible party

If the responsible party alleges that the discharge or threat of a discharge was caused solely by an act or omission of a third party, the responsible party —

(i) in accordance with section 2713 of this title, shall pay removal costs and damages to any claimant; and

(ii) shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs or damages from the third party or the Fund paid under this subsection.

(2) Limitation applied**(A) Owner or operator of vessel or facility**

If the act or omission of a third party that causes an incident occurs in

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connection with a vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided in section 2704 of this title as applied with respect to the vessel or facility.

(B) Other cases

In any other case, the liability of a third party or parties shall not exceed the limitation which would have been applicable to the responsible party of the vessel or facility from which the discharge actually occurred if the responsible party were liable.

* * *

33 U.S.C. § 2703**§ 2703. Defenses to liability****(a) Complete defenses**

A responsible party is not liable for removal costs or damages under section 2702 of this title if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by —

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(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail), if the responsible party establishes, by a preponderance of the evidence, that the responsible party —

(A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and

(B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions;
or

(4) any combination of paragraphs (1), (2), and (3).

(b) Defenses as to particular claimants

A responsible party is not liable under section 2702 of this title to a claimant, to the extent that the incident is caused by the gross negligence or willful misconduct of the claimant.

*Appendix E***(c) Limitation on complete defense**

Subsection (a) of this section does not apply with respect to a responsible party who fails or refuses —

(1) to report the incident as required by law if the responsible party knows or has reason to know of the incident;

(2) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(3) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title, as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

* * *

33 U.S.C. § 2704**§ 2704. Limits on liability****(a) General rule**

Except as otherwise provided in this section, the total of the liability of a responsible party under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed —

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(1) for a tank vessel (except a tank vessel on which the only oil carried as cargo is an animal fat or vegetable oil, as those terms are used in section 2720 of this title) the greater of —

(A) \$1,200 per gross ton; or

(B)(i) in the case of a vessel greater than 3,000 gross tons, \$10,000,000; or

(ii) in the case of a vessel of 3,000 gross tons or less, \$2,000,000;

(2) for any other vessel, \$600 per gross ton or \$500,000, whichever is greater;

(3) for an offshore facility except a deepwater port, the total of all removal costs plus \$75,000,000; and

(4) for any onshore facility and a deepwater port, \$350,000,000.

(b) Division of liability for mobile offshore drilling units

(1) Treated first as tank vessel

For purposes of determining the responsible party and applying this chapter and except as provided in paragraph (2), a mobile offshore drilling unit which is being used as an offshore facility is deemed to be a tank vessel with respect

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to the discharge, or the substantial threat of a discharge, of oil on or above the surface of the water.

(2) Treated as facility for excess liability

To the extent that removal costs and damages from any incident described in paragraph (1) exceed the amount for which a responsible party is liable (as that amount may be limited under subsection (a)(1) of this section), the mobile offshore drilling unit is deemed to be an offshore facility. For purposes of applying subsection (a)(3) of this section, the amount specified in that subsection shall be reduced by the amount for which the responsible party is liable under paragraph (1).

(c) Exceptions**(1) Acts of responsible party**

Subsection (a) of this section does not apply if the incident was proximately caused by —

(A) gross negligence or willful misconduct of, or

(B) the violation of an applicable Federal safety, construction, or operating regulation by,

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the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

(2) Failure or refusal of responsible party

Subsection (a) of this section does not apply if the responsible party fails or refuses —

(A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;

(B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title, as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

(3) OCS facility or vessel

Notwithstanding the limitations established under subsection (a) of this section and the

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defenses of section 2703 of this title, all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge or substantial threat of a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.

(d) Adjusting limits of liability**(1) Onshore facilities**

Subject to paragraph (2), the President may establish by regulation, with respect to any class or category of onshore facility, a limit of liability under this section of less than \$350,000,000, but not less than \$8,000,000, taking into account size, storage capacity, oil throughput, proximity to sensitive areas, type of oil handled, history of discharges, and other factors relevant to risks posed by the class or category of facility.

(2) Deepwater ports and associated vessels**(A) Study**

The Secretary shall conduct a study of the relative operational and environmental risks posed by the transportation of oil by vessel to deepwater ports (as defined in section

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3 of the Deepwater Port Act of 1974 (33 U.S.C. 1502)) versus the transportation of oil by vessel to other ports. The study shall include a review and analysis of offshore lightering practices used in connection with that transportation, an analysis of the volume of oil transported by vessel using those practices, and an analysis of the frequency and volume of oil discharges which occur in connection with the use of those practices.

(B) Report

Not later than 1 year after August 18, 1990, the Secretary shall submit to the Congress a report on the results of the study conducted under subparagraph (A).

(C) Rulemaking proceeding

If the Secretary determines, based on the results of the study conducted under this subparagraph (A), that the use of deepwater ports in connection with the transportation of oil by vessel results in a lower operational or environmental risk than the use of other ports, the Secretary shall initiate, not later than the 180th day following the date of submission of the report to the Congress

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under subparagraph (B), a rulemaking proceeding to lower the limits of liability under this section for deepwater ports as the Secretary determines appropriate. The Secretary may establish a limit of liability of less than \$350,000,000, but not less than \$50,000,000, in accordance with paragraph (1).

(3) Periodic reports

The President shall, within 6 months after August 18, 1990, and from time to time thereafter, report to the Congress on the desirability of adjusting the limits of liability specified in subsection (a) of this section.

(4) Adjustment to reflect Consumer Price Index

The President shall, by regulations issued not less often than every 3 years, adjust the limits of liability specified in subsection (a) of this section to reflect significant increases in the Consumer Price Index.

* * *

*Appendix E***33 U.S.C. § 2705****§ 2705. Interest; partial payment of claims****(a) General rule**

The responsible party or the responsible party's guarantor is liable to a claimant for interest on the amount paid in satisfaction of a claim under this chapter for the period described in subsection (b) of this section. The responsible party shall establish a procedure for the payment or settlement of claims for interim, short-term damages. Payment or settlement of a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim.

(b) Period**(1) In general**

Except as provided in paragraph (2), the period for which interest shall be paid is the period beginning on the 30th day following the date on which the claim is presented to the responsible party or guarantor and ending on the date on which the claim is paid.

*Appendix E***(2) Exclusion of period due to offer by guarantor**

If the guarantor offers to the claimant an amount equal to or greater than that finally paid in satisfaction of the claim, the period described in paragraph (1) does not include the period beginning on the date the offer is made and ending on the date the offer is accepted. If the offer is made within 60 days after the date on which the claim is presented under section 2713(a) of this title, the period described in paragraph (1) does not include any period before the offer is accepted.

(3) Exclusion of periods in interests of justice

If in any period a claimant is not paid due to reasons beyond the control of the responsible party or because it would not serve the interests of justice, no interest shall accrue under this section during that period.

(4) Calculation of interest

The interest paid under this section shall be calculated at the average of the highest rate for commercial and finance company paper of maturities of 180 days or less obtaining on each of the days included within the period for which interest must be paid to the claimant, as published in the Federal Reserve Bulletin.

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(5) Interest not subject to liability limits

(A) In general

Interest (including prejudgment interest) under this paragraph is in addition to damages and removal costs for which claims may be asserted under section 2702 of this title and shall be paid without regard to any limitation of liability under section 2704 of this title.

(B) Payment by guarantor

The payment of interest under this subsection by a guarantor is subject to section 2716(g) of this title.

* * *

33 U.S.C. § 2706

§ 2706. Natural resources

(a) Liability

In the case of natural resource damages under section 2702(b)(2)(A) of this title, liability shall be —

(1) to the United States Government for natural resources belonging to, managed by, controlled by, or appertaining to the United States;

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(2) to any State for natural resources belonging to, managed by, controlled by, or appertaining to such State or political subdivision thereof;

(3) to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe; and

(4) in any case in which section 2707 of this title applies, to the government of a foreign country for natural resources belonging to, managed by, controlled by, or appertaining to such country.

(b) Designation of trustees

(1) In general

The President, or the authorized representative of any State, Indian tribe, or foreign government, shall act on behalf of the public, Indian tribe, or foreign country as trustee of natural resources to present a claim for and to recover damages to the natural resources.

(2) Federal trustees

The President shall designate the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter.

*Appendix E***(3) State trustees**

The Governor of each State shall designate State and local officials who may act on behalf of the public as trustee for natural resources under this chapter and shall notify the President of the designation.

(4) Indian tribe trustees

The governing body of any Indian tribe shall designate tribal officials who may act on behalf of the tribe or its members as trustee for natural resources under this chapter and shall notify the President of the designation.

(5) Foreign trustees

The head of any foreign government may designate the trustee who shall act on behalf of that government as trustee for natural resources under this chapter.

(c) Functions of trustees**(1) Federal trustees**

The Federal officials designated under subsection (b)(2) of this section —

(A) shall assess natural resource damages under section 2702(b)(2)(A) of

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this title for the natural resources under their trusteeship;

(B) may, upon request of and reimbursement from a State or Indian tribe and at the Federal officials' discretion, assess damages for the natural resources under the State's or tribe's trusteeship; and

(C) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(2) State trustees

The State and local officials designated under subsection (b)(3) of this section —

(A) shall assess natural resource damages under section 2702(b)(2)(A) of this title for the purposes of this chapter for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

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(3) Indian tribe trustees

The tribal officials designated under subsection (b)(4) of this section —

(A) shall assess natural resource damages under section 2702(b)(2)(A) of this title for the purposes of this chapter for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(4) Foreign trustees

The trustees designated under subsection (b)(5) of this section —

(A) shall assess natural resource damages under section 2702(b)(2)(A) of this title for the purposes of this chapter for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

*Appendix E***(5) Notice and opportunity to be heard**

Plans shall be developed and implemented under this section only after adequate public notice, opportunity for a hearing, and consideration of all public comment.

(d) Measure of damages**(1) In general**

The measure of natural resource damages under section 2702(b)(2)(A) of this title is —

(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;

(B) the diminution in value of those natural resources pending restoration; plus

(C) the reasonable cost of assessing those damages.

(2) Determine costs with respect to plans

Costs shall be determined under paragraph (1) with respect to plans adopted under subsection (c) of this section.

*Appendix E***(3) No double recovery**

There shall be no double recovery under this chapter for natural resource damages, including with respect to the costs of damage assessment or restoration, rehabilitation, replacement, or acquisition for the same incident and natural resource.

(e) Damage assessment regulations**(1) Regulations**

The President, acting through the Under Secretary of Commerce for Oceans and Atmosphere and in consultation with the Administrator of the Environmental Protection Agency, the Director of the United States Fish and Wildlife Service, and the heads of other affected agencies, not later than 2 years after August 18, 1990, shall promulgate regulations for the assessment of natural resource damages under section 2702(b)(2)(A) of this title resulting from a discharge of oil for the purpose of this chapter.

(2) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this chapter made under subsection (d) of this section by a Federal, State, or Indian trustee in accordance with the regulations promulgated under paragraph (1)

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shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter.

(f) Use of recovered sums

Sums recovered under this chapter by a Federal, State, Indian, or foreign trustee for natural resource damages under section 2702(b)(2)(A) of this title shall be retained by the trustee in a revolving trust account, without further appropriation, for use only to reimburse or pay costs incurred by the trustee under subsection (c) of this section with respect to the damaged natural resources. Any amounts in excess of those required for these reimbursements and costs shall be deposited in the Fund.

(g) Compliance

Review of actions by any Federal official where there is alleged to be a failure of that official to perform a duty under this section that is not discretionary with that official may be had by any person in the district court in which the person resides or in which the alleged damage to natural resources occurred. The court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party. Nothing in this subsection shall restrict any right which any person may have to seek relief under any other provision of law.

* * *

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33 U.S.C. § 2707

§ 2707. Recovery by foreign claimants

(a) Required showing by foreign claimants

(1) In general

In addition to satisfying the other requirements of this chapter, to recover removal costs or damages resulting from an incident a foreign claimant shall demonstrate that —

(A) the claimant has not been otherwise compensated for the removal costs or damages; and

(B) recovery is authorized by a treaty or executive agreement between the United States and the claimant's country, or the Secretary of State, in consultation with the Attorney General and other appropriate officials, has certified that the claimant's country provides a comparable remedy for United States claimants.

(2) Exceptions

Paragraph (1)(B) shall not apply with respect to recovery by a resident of Canada in the case of an incident described in subsection (b)(4) of this section.

*Appendix E***(b) Discharges in foreign countries**

A foreign claimant may make a claim for removal costs and damages resulting from a discharge, or substantial threat of a discharge, of oil in or on the territorial sea, internal waters, or adjacent shoreline of a foreign country, only if the discharge is from —

(1) an Outer Continental Shelf facility or a deepwater port;

(2) a vessel in the navigable waters;

(3) a vessel carrying oil as cargo between 2 places in the United States; or

(4) a tanker that received the oil at the terminal of the pipeline constructed under the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.), for transportation to a place in the United States, and the discharge or threat occurs prior to delivery of the oil to that place.

(c) "Foreign claimant" defined

In this section, the term "foreign claimant" means —

(1) a person residing in a foreign country;

(2) the government of a foreign country; and

(3) an agency or political subdivision of a foreign country.

* * *

*Appendix E***33 U.S.C. § 2708****§ 2708. Recovery by responsible party****(a) In general**

The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 2713 of this title only if the responsible party demonstrates that —

(1) the responsible party is entitled to a defense to liability under section 2703 of this title; or

(2) the responsible party is entitled to a limitation of liability under section 2704 of this title.

(b) Extent of recovery

A responsible party who is entitled to a limitation of liability may assert a claim under section 2713 of this title only to the extent that the sum of the removal costs and damages incurred by the responsible party plus the amounts paid by the responsible party, or by the guarantor on behalf of the responsible party, for claims asserted under section 2713 of this title exceeds the amount to which the total of the liability under section 2702 of this title and removal costs and damages incurred by, or on behalf of, the responsible party is limited under section 2704 of this title.

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33 U.S.C. § 2709

§ 2709. Contribution

A person may bring a civil action for contribution against any other person who is liable or potentially liable under this chapter or another law. The action shall be brought in accordance with section 2717 of this title.

* * *

33 U.S.C. § 2710

§ 2710. Indemnification agreements

(a) Agreements not prohibited

Nothing in this chapter prohibits my agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this chapter.

(b) Liability not transferred

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer liability imposed under this chapter from a responsible party or from any person who may be liable for an incident under this chapter to any other person.

(c) Relationship to other causes of action

Nothing in this chapter, including the provisions of subsection (b) of this section, bars a cause of action that a

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responsible party subject to liability under this chapter, or a guarantor, has or would have, by reason of subrogation or otherwise, against any person.

* * *

33 U.S.C. § 2711**§ 2711. Consultation on removal actions**

The President shall consult with the affected trustees designated under section 2706 of this title on the appropriate removal action to be taken in connection with any discharge of oil. For the purposes of the National Contingency Plan, removal with respect to any discharge shall be considered completed when so determined by the President in consultation with the Governor or Governors of the affected States. However, this determination shall not preclude additional removal actions under applicable State law.

* * *

33 U.S.C. § 2712**§ 2712. Uses of Fund****(a) Uses generally**

The Fund shall be available to the President for —

- (1) the payment of removal costs, including the costs of monitoring removal actions,

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determined by the President to be consistent with the National Contingency Plan —

(A) by Federal authorities; or

(B) by a Governor or designated State official under subsection (d) of this section;

(2) the payment of costs incurred by Federal, State, or Indian tribe trustees in carrying out their functions under section 2706 of this title for assessing natural resource damages and for developing and implementing plans for the restoration, rehabilitation, replacement, or acquisition of the equivalent of damaged resources determined by the President to be consistent with the National Contingency Plan;

(3) the payment of removal costs determined by the President to be consistent with the National Contingency Plan as a result of, and damages resulting from, a discharge, or a substantial threat of a discharge, of oil from a foreign offshore unit;

(4) the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages;

(5) the payment of Federal administrative, operational, and personnel costs and expenses

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reasonably necessary for and incidental to the implementation, administration, and enforcement of this chapter (including, but not limited to, sections 2704(d)(2) of this title, 2706(e) of this title, 4107 of this Act, 4110 of this Act, 4111 of this Act, 4112 of this Act, 4117 of this Act, 2736 of this title, 8103 of this Act, and subchapter IV of this chapter) and subsections (b), (c), (d), (j), and (l) of section 1321 of this title, as amended by this Act, with respect to prevention, removal, and enforcement related to oil discharges, provided that —

(A) not more than \$25,000,000 in each fiscal year shall be available to the Secretary for operating expenses incurred by the Coast Guard;

(B) not more than \$30,000,000 each year through the end of fiscal year 1992 shall be available to establish the National Response System under section 1321(j) of this title, as amended by this Act, including the purchase and prepositioning of oil spill removal equipment; and

(C) not more than \$27,250,000 in each fiscal year shall be available to carry out subchapter IV of this chapter.

*Appendix E***(b) Defense to liability for Fund**

The Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of that claimant.

(c) Obligation of Fund by Federal officials

The President may promulgate regulations designating one or more Federal officials who may obligate money in accordance with subsection (a) of this section.

(d) Access to Fund by State officials**(1) Immediate removal**

In accordance with regulations promulgated under this section, the President, upon the request of the Governor of a State or pursuant to an agreement with a State under paragraph (2), may obligate the Fund for payment in an amount not to exceed \$250,000 for removal costs consistent with the National Contingency Plan required for the immediate removal of a discharge, or the mitigation or prevention of a substantial threat of a discharge, of oil.

*Appendix E***(2) Agreements****(A) In general**

The President shall enter into an agreement with the Governor of any interested State to establish procedures under which the Governor or a designated State official may receive payments from the Fund for removal costs pursuant to paragraph (1).

(B) Terms

Agreements under this paragraph —

(i) may include such terms and conditions as may be agreed upon by the President and the Governor of a State;

(ii) shall provide for political subdivisions of the State to receive payments for reasonable removal costs; and

(iii) may authorize advance payments from the Fund to facilitate removal efforts.

*Appendix E***(e) Regulations**

The President shall —

(1) not later than 6 months after August 18, 1990, publish proposed regulations detailing the manner in which the authority to obligate the Fund and to enter into agreements under this subsection shall be exercised; and

(2) not later than 3 months after the close of the comment period for such proposed regulations, promulgate final regulations for that purpose.

(f) Rights of subrogation

Payment of any claim or obligation by the Fund under this chapter shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

(g) Audits

The Comptroller General shall audit all payments, obligations, reimbursements, and other uses of the Fund, to assure that the Fund is being properly administered and that claims are being appropriately and expeditiously considered. The Comptroller General shall submit to the Congress an interim report one year after August 18, 1990. The Comptroller General shall thereafter audit the Fund as is appropriate. Each Federal agency shall cooperate with the Comptroller General in carrying out this subsection.

*Appendix E***(h) Period of limitations for claims****(1) Removal costs**

No claim may be presented under this subchapter for recovery of removal costs for an incident unless the claim is presented within 6 years after the date of completion of all removal actions for that incident.

(2) Damages

No claim may be presented under this section for recovery of damages unless the claim is presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care, or in the case of natural resource damages under section 2702(b)(2)(A) of this title, if later, the date of completion of the natural resources damage assessment under section 2706(e) of this title.

(3) Minors and incompetents

The time limitations contained in this subsection shall not begin to run —

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for the minor, or

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(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for the incompetent.

(i) Limitation on payment for same costs

In any case in which the President has paid an amount from the Fund for any removal costs or damages specified under subsection (a) of this section, no other claim may be paid from the Fund for the same removal costs or damages.

(j) Obligation in accordance with plan

(1) In general

Except as provided in paragraph (2), amounts may be obligated from the Fund for the restoration, rehabilitation, replacement, or acquisition of natural resources only in accordance with a plan adopted under section 2706(c) of this title.

(2) Exception

Paragraph (1) shall not apply in a situation requiring action to avoid irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources or similar need for emergency action.

*Appendix E***(k) Preference for private persons in area affected by discharge****(1) In general**

In the expenditure of Federal funds for removal of oil, including for distribution of supplies, construction, and other reasonable and appropriate activities, under a contract or agreement with a private person, preference shall be given, to the extent feasible and practicable, to private persons residing or doing business primarily in the area affected by the discharge of oil.

(2) Limitation

This subsection shall not be considered to restrict the use of Department of Defense resources.

* * *

33 U.S.C. § 2713**§ 2713. Claims procedure****(a) Presentation**

Except as provided in subsection (b) of this section, all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 2714(a) of this title.

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(b) Presentation to Fund

(1) In general

Claims for removal costs or damages may be presented first to the Fund —

(A) if the President has advertised or otherwise notified claimants in accordance with section 2714(c) of this title;

(B) by a responsible party who may assert a claim under section 2708 of this title;

(C) by the Governor of a State for removal costs incurred by that State; or

(D) by a United States claimant in a case where a foreign offshore unit has discharged oil causing damage for which the Fund is liable under section 2712(a) of this title.

(2) Limitation on presenting claim

No claim of a person against the Fund may be approved or certified during the pendency of an action by the person in court to recover costs which are the subject of the claim.

*Appendix E***(c) Election**

If a claim is presented in accordance with subsection (a) of this section and —

(1) each person to whom the claim is presented denies all liability for the claim, or

(2) the claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to section 2714(b) of this title, whichever is later,

the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

(d) Uncompensated damages

If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund.

(e) Procedure for claims against Fund

The President shall promulgate, and may from time to time amend, regulations for the presentation, filing, processing, settlement, and adjudication of claims under this chapter against the Fund.

*Appendix E***33 U.S.C. § 2714****§ 2714. Designation of source and advertisement****(a) Designation of source and notification**

When the President receives information of an incident, the President shall, where possible and appropriate, designate the source or sources of the discharge or threat. If a designated source is a vessel or a facility, the President shall immediately notify the responsible party and the guarantor, if known, of that designation.

(b) Advertisement by responsible party or guarantor

(1) If a responsible party or guarantor fails to inform the President, within 5 days after receiving notification of a designation under subsection (a) of this section, of the party's or the guarantor's denial of the designation, such party or guarantor shall advertise the designation and the procedures by which claims may be presented, in accordance with regulations promulgated by the President. Advertisement under the preceding sentence shall begin no later than 15 days after the date of the designation made under subsection (a) of this section. If advertisement is not otherwise made in accordance with this subsection, the President shall promptly and at the expense of the responsible party or the guarantor involved, advertise the designation and the procedures by which claims may be presented to the responsible

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party or guarantor. Advertisement under this subsection shall continue for a period of no less than 30 days.

(2) An advertisement under paragraph (1) shall state that a claimant may present a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled and that payment of such a claim shall not preclude recovery for damages not reflected in the paid or settled partial claim.

(c) Advertisement by President

If

(1) the responsible party and the guarantor both deny a designation within 5 days after receiving notification of a designation under subsection (a) of this section,

(2) the source of the discharge or threat was a public vessel, or

(3) the President is unable to designate the source or sources of the discharge or threat under subsection (a) of this section,

the President shall advertise or otherwise notify potential claimants of the procedures by which claims may be presented to the Fund.

* * *

*Appendix E***33 U.S.C. § 2715****§ 2715. Subrogation****(a) In general**

Any person, including the Fund, who pays compensation pursuant to this chapter to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.

(b) Interim damages**(1) In general**

If a responsible party, a guarantor, or the Fund has made payment to a claimant for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, subrogation under subsection (a) of this section shall apply only with respect to the portion of the claim reflected in the paid interim claim.

(2) Final damages

Payment of such a claim shall not foreclose a claimant's right to recovery of all damages to which the claimant otherwise is entitled under this chapter or under any other law.

*Appendix E***(c) Actions on behalf of Fund**

At the request of the Secretary, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this chapter, and all costs incurred by the Fund by reason of the claim, including interest (including prejudgment interest), administrative and adjudicative costs, and attorney's fees. Such an action may be commenced against any responsible party or (subject to section 2716 of this title) guarantor, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the cost or damages for which the compensation was paid. Such an action shall be commenced against the responsible foreign government or other responsible party to recover any removal costs or damages paid from the Fund as the result of the discharge, or substantial threat of discharge, of oil from a foreign offshore unit.

* * *

33 U.S.C. § 2716**§ 2716. Financial responsibility****(a) Requirement**

The responsible party for —

- (1) any vessel over 300 gross tons (except a non-self-propelled vessel that does not carry oil as cargo or fuel) using any place subject to the jurisdiction of the United States; or

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(2) any vessel using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States;

shall establish and maintain, in accordance with regulations promulgated by the Secretary, evidence of financial responsibility sufficient to meet the maximum amount of liability to which the responsible party could be subjected under section 2704(a) or (d) of this title, in a case where the responsible party would be entitled to limit liability under that section. If the responsible party owns or operates more than one vessel, evidence of financial responsibility need be established only to meet the amount of the maximum liability applicable to the vessel having the greatest maximum liability.

(b) Sanctions**(1) Withholding clearance**

The Secretary of the Treasury shall withhold or revoke the clearance required by section 91 of the Appendix to Title 46 of any vessel subject to this section that does not have the evidence of financial responsibility required for the vessel under this section.

(2) Denying entry to or detaining vessels

The Secretary may —

(A) deny entry to any vessel to any place in the United States, or to the navigable waters, or

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(B) detain at the place,

any vessel that, upon request, does not produce the evidence of financial responsibility required for the vessel under this section.

(3) Seizure of vessel

Any vessel subject to the requirements of this section which is found in the navigable waters without the necessary evidence of financial responsibility for the vessel shall be subject to seizure by and forfeiture to the United States.

(c) Offshore facilities

(1) In general

(A) Evidence of financial responsibility required

Except as provided in paragraph (2), a responsible party with respect to an offshore facility that —

(i)(I) is located seaward of the line of ordinary low water along that portion of the coast that is in direct contact with the open sea and the line marking the seaward limit of inland waters; or

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(II) is located in coastal inland waters, such as bays or estuaries, seaward of the line of ordinary low water along that portion of the coast that is not in direct contact with the open sea;

(ii) is used for exploring for, drilling for, producing, or transporting oil from facilities engaged in oil exploration, drilling, or production; and

(iii) has a worst-case oil spill discharge potential of more than 1,000 barrels of oil (or a lesser amount if the President determines that the risks posed by such facility justify it),

shall establish and maintain evidence of financial responsibility in the amount required under subparagraph (B) or (C), as applicable.

(B) Amount required generally

Except as provided in subparagraph (C), the amount of financial responsibility for offshore facilities that

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meet the criteria of subparagraph (A)
is —

(i) \$35,000,000 for an offshore facility located seaward of the seaward boundary of a State; or

(ii) \$10,000,000 for an offshore facility located landward of the seaward boundary of a State.

(C) Greater amount

If the President determines that an amount of financial responsibility for a responsible party greater than the amount required by subparagraph (B) is justified based on the relative operational, environmental, human health, and other risks posed by the quantity or quality of oil that is explored for, drilled for, produced, or transported by the responsible party, the evidence of financial responsibility required shall be for an amount determined by the President not exceeding \$150,000,000.

(D) Multiple facilities

In a case in which a person is a responsible party for more than one

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facility subject to this subsection, evidence of financial responsibility need be established only to meet the amount applicable to the facility having the greatest financial responsibility requirement under this subsection.

(E) Definition

For the purpose of this paragraph, the seaward boundary of a State shall be determined in accordance with section 1301(b) of Title 43.

(2) Deepwater ports

Each responsible party with respect to a deepwater port shall establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability to which the responsible party could be subjected under section 2704(a) of this title in a case where the responsible party would be entitled to limit liability under that section. If the Secretary exercises the authority under section 2704(d)(2) of this title to lower the limit of liability for deepwater ports, the responsible party shall establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability so established. In a case in which a person is the responsible party for more than one deepwater port, evidence of financial

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responsibility need be established only to meet the maximum liability applicable to the deepwater port having the greatest maximum liability.

(e)¹ Methods of financial responsibility

Financial responsibility under this section may be established by any one, or by any combination, of the following methods which the Secretary (in the case of a vessel) or the President (in the case of a facility) determines to be acceptable: evidence of insurance, surety bond, guarantee, letter of credit, qualification as a self-insurer, or other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States. In promulgating requirements under this section, the Secretary or the President, as appropriate, may specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing evidence of financial responsibility to effectuate the purposes of this chapter.

(f) Claims against guarantor**(1) In general**

Subject to paragraph (2), a claim for which liability may be established under section 2702 of this title may be asserted directly against any guarantor providing evidence of financial responsibility for a responsible party liable under

1. So in original. No subsec. (d) was enacted.

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that section for removal costs and damages to which the claim pertains. In defending against such a claim, the guarantor may invoke —

(A) all rights and defenses which would be available to the responsible party under this chapter;

(B) any defense authorized under subsection (e) of this section; and

(C) the defense that the incident was caused by the willful misconduct of the responsible party.

The guarantor may not invoke any other defense that might be available in proceedings brought by the responsible party against the guarantor.

(2) Further requirement

A claim may be asserted pursuant to paragraph (1) directly against a guarantor providing evidence of financial responsibility under subsection (c)(1) of this section with respect to an offshore facility only if —

(A) the responsible party for whom evidence of financial responsibility has been provided has denied or failed to pay a claim under this chapter on the basis of being insolvent, as defined under

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section 101(32) of Title 11, and applying generally accepted accounting principles;

(B) the responsible party for whom evidence of financial responsibility has been provided has filed a petition for bankruptcy under Title 11; or

(C) the claim is asserted by the United States for removal costs and damages or for compensation paid by the Fund under this chapter, including costs incurred by the Fund for processing compensation claims.

(3) Rulemaking authority

Not later than 1 year after the October 19, 1996, the President shall promulgate regulations to establish a process for implementing paragraph (2) in a manner that will allow for the orderly and expeditious presentation and resolution of claims and effectuate the purposes of this chapter.

(g) Limitation on guarantor's liability

Nothing in this chapter shall impose liability with respect to an incident on any guarantor for damages or removal costs which exceed, in the aggregate, the amount of financial responsibility which that guarantor has provided for a responsible party pursuant to this section. The total liability

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of the guarantor on direct action for claims brought under this chapter with respect to an incident shall be limited to that amount.

(h) Continuation of regulations

Any regulation relating to financial responsibility, which has been issued pursuant to any provision of law repealed or superseded by this chapter, and which is in effect on the date immediately preceding the effective date of this Act, is deemed and shall be construed to be a regulation issued pursuant to this section. Such a regulation shall remain in full force and effect unless and until superseded by a new regulation issued under this section.

(i) Unified certificate

The Secretary may issue a single unified certificate of financial responsibility for purposes of this chapter and any other law.

* * *

33 U.S.C. § 2716a**§ 2716a. Financial responsibility civil penalties****(a) Administrative**

Any person who, after notice and an opportunity for a hearing, is found to have failed to comply with the requirements of section 2716 of this title or the regulations

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issued under that section, or with a denial or detention order issued under subsection (c)(2) of that section, shall be liable to the United States for a civil penalty, not to exceed \$25,000 per day of violation. The amount of the civil penalty shall be assessed by the President by written notice. In determining the amount of the penalty, the President shall take into account the nature, circumstances, extent, and gravity of the violation, the degree of culpability, any history of prior violation, ability to pay, and such other matters as justice may require. The President may compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which had been imposed under this paragraph. If any person fails to pay an assessed civil penalty after it has become final, the President may refer the matter to the Attorney General for collection.

(b) Judicial

In addition to, or in lieu of, assessing a penalty under subsection (a) of this section, the President may request the Attorney General to secure such relief as necessary to compel compliance with this section 2716 of this title, including a judicial order terminating operations. The district courts of the United States shall have jurisdiction to grant any relief as the public interest and the equities of the case may require.

* * *

*Appendix E***33 U.S.C. § 2717****§ 2717. Litigation, jurisdiction, and venue****(a) Review of regulations**

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within 90 days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction

Except as provided in subsections (a) and (c) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process. For the purposes of this section, the Fund shall reside in the District of Columbia.

*Appendix E***(c) State court jurisdiction**

A State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this chapter, may consider claims under this chapter or State law and any final judgment of such court (when no longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of this chapter.

(d) Assessment and collection of tax

The provisions of subsections (a), (b), and (c) of this section shall not apply to any controversy or other matter resulting from the assessment or collection of any tax, or to the review of any regulation promulgated under Title 26.

(e) Savings provision

Nothing in this title shall apply to any cause of action or right of recovery arising from any incident which occurred prior to August 18, 1990. Such claims shall be adjudicated pursuant to the law applicable on the date of the incident.

(f) Period of limitations**(1) Damages**

Except as provided in paragraphs (3) and (4), an action for damages under this chapter shall be barred unless the action is brought within 3 years after —

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(A) the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care, or

(B) in the case of natural resource damages under section 2702(b)(2)(A) of this title, the date of completion of the natural resources damage assessment under section 2706(c) of this title.

(2) Removal costs

An action for recovery of removal costs referred to in section 2702(b)(1) of this title must be commenced within 3 years after completion of the removal action. In any such action described in this subsection, the court shall enter a declaratory judgment on liability for removal costs or damages that will be binding on any subsequent action or actions to recover further removal costs or damages. Except as otherwise provided in this paragraph, an action may be commenced under this subchapter for recovery of removal costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any removal costs or damages may be commenced more than 3 years after —

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(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this chapter by reason of payment of a claim may be commenced under this chapter more than 3 years after the date of payment of such claim.

(5) Commencement

The time limitations contained herein shall not begin to run —

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

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33 U.S.C. § 2718

§ 2718. Relationship to other law

(a) Preservation of State authorities; Solid Waste Disposal Act

Nothing in this chapter or the Act of March 3, 1851 shall —

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to —

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such a discharge; or

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.

(b) Preservation of State funds

Nothing in this chapter or in section 9509 of Title 26 shall in any way affect, or be construed to affect, the authority of any State —

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(1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or

(2) to require any person to contribute to such a fund.

(c) Additional requirements and liabilities; penalties

Nothing in this chapter, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of Title 26, shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof —

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil.

(d) Federal employee liability

For purposes of section 2679(b)(2)(B) of Title 28, nothing in this chapter shall be construed to authorize or create a cause of action against a Federal officer or employee in the officer's or employee's personal or individual capacity for

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any act or omission while acting within the scope of the officer's or employee's office or employment.

* * *

33 U.S.C. § 2719**§ 2719. State financial responsibility**

A State may enforce, on the navigable waters of the State, the requirements for evidence of financial responsibility under section 2716 of this title.

* * *

33 U.S.C. § 2720**§ 2720. Differentiation among fats, oils, and greases****(a) In general**

Except as provided in subsection (c) of this section, in issuing or enforcing any regulation or establishing any interpretation or guideline relating to the transportation, storage, discharge, release, emission, or disposal of a fat, oil, or grease under any Federal law, the head of that Federal agency shall —

(1) differentiate between and establish separate classes for —

(A) animal fats and oils and greases, and fish and marine mammal

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oils, within the meaning of paragraph (2) of section 61(a) of Title 13, and oils of vegetable origin, including oils from the seeds, nuts, and kernels referred to in paragraph (1)(A) of that section; and

(B) other oils and greases, including petroleum; and

(2) apply standards to different classes of fats and oils based on considerations in subsection (b) of this section.

(b) Considerations

In differentiating between the class of fats, oils, and greases described in subsection (a)(1)(A) of this section and the class of oils and greases described in subsection (a)(1)(B) of this section, the head of the Federal agency shall consider differences in the physical, chemical, biological, and other properties, and in the environmental effects, of the classes.

(c) Exception

The requirements of this Act shall not apply to the Food and Drug Administration and the Food Safety and Inspection Service.

(d) Omitted

* * *

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33 U.S.C. § 2751

§ 2751. Savings provisions

* * *

(e) Admiralty and maritime law

Except as otherwise provided in this chapter, this chapter does not affect —

(1) admiralty and maritime law; or

(2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * *

46 U.S.C. § 183

§ 183. Amount of liability

(a) Privity or knowledge of owner; limitation

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter,

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or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) Seagoing vessels; losses not covered in full

In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than \$420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to \$420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) Tonnage of seagoing vessels

For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

*Appendix E***(d) Loss of life or bodily injury arising on distinct occasions**

The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) Privity imputed to owner

In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) "Seagoing vessel" defined

As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title.

*Appendix E***(g) Vicarious liability for medical malpractice at
shoreside facilities; statutory limitations**

In a suit by any person in which the operator or owner of a vessel or employer of a crewmember is claimed to have vicarious liability for medical malpractice with regard to a crewmember occurring at a shoreside facility, and to the extent the damages resulted from the conduct of any shoreside doctor, hospital, medical facility, or other health care provider, such operator, owner, or employer shall be entitled to rely upon any and all statutory limitations of liability applicable to the doctor, hospital, medical facility, or other health care provider in the State of the United States in which the shoreside medical care was provided.

* * *

46 U.S.C. § 2103**§ 2103. Superintendence of the merchant marine**

The Secretary has general superintendence over the merchant marine of the United States and of merchant marine personnel insofar as the enforcement of this subtitle is concerned and insofar as those vessels and personnel are not subject, under other law, to the supervision of another official of the United States Government. In the interests of marine safety and seamen's welfare, the Secretary shall enforce this subtitle and shall carry out correctly and uniformly administer this subtitle. The Secretary may prescribe regulations to carry out the provisions of this subtitle.

* * *

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46 U.S.C. § 2104

§ 2104. Delegation

(a) The Secretary may delegate the duties and powers conferred by this subtitle to any officer, employee, or member of the Coast Guard, and may provide for the subdelegation of those duties and powers.

* * *

46 U.S.C. § 3201

§ 3201. Definitions

In this chapter —

(1) "International Safety Management Code" has the same meaning given that term in chapter IX of the Annex to the International Convention for the Safety of Life at Sea, 1974;

(2) "responsible person" means —

(A) the owner of a vessel to which this chapter applies; or

(B) any other person that has —

(i) assumed the responsibility for operation of a vessel to which this chapter applies from the owner; and

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(ii) agreed to assume with respect to the vessel responsibility for complying with all the requirements of this chapter and the regulations prescribed under this chapter.

(3) "vessel engaged on a foreign voyage" means a vessel to which this chapter applies —

(A) arriving at a place under the jurisdiction of the United States from a place in a foreign country;

(B) making a voyage between places outside the United States; or

(C) departing from a place under the jurisdiction of United States for a place in a foreign country.

* * *

46 U.S.C. § 3202

§ 3202. Application

(a) **Mandatory application.** — This chapter applies to the following vessels engaged on a foreign voyage:

(1) Beginning July 1, 1998 —

(A) a vessel transporting more than 12 passengers described in section 2101(21)(A) of this title; and

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(B) a tanker, bulk freight vessel, or high-speed freight vessel, of at least 500 gross tons.

(2) Beginning July 1, 2002, a freight vessel and a self-propelled mobile offshore drilling unit of at least 500 gross tons.

(b) Voluntary application. — This chapter applies to a vessel not described in subsection (a) of this section if the owner of the vessel requests the Secretary to apply this chapter to the vessel.

(c) Exception. — Except as provided in subsection (b) of this section, this chapter does not apply to —

(1) a barge;

(2) a recreational vessel not engaged in commercial service;

(3) a fishing vessel;

(4) a vessel operating on the Great Lakes or its tributary and connecting waters; or

(5) a public vessel.

* * *

*Appendix E***46 U.S.C. § 3203****§ 3203. Safety management system**

(a) In general. — The Secretary shall prescribe regulations which establish a safety management system for responsible persons and vessels to which this chapter applies, including —

(1) a safety and environmental protection policy;

(2) instructions and procedures to ensure safe operation of those vessels and protection of the environment in compliance with international and United States law;

(3) defined levels of authority and lines of communications between, and among, personnel on shore and on the vessel;

(4) procedures for reporting accidents and nonconformities with this chapter;

(5) procedures for preparing for and responding to emergency situations; and

(6) procedures for internal audits and management reviews of the system.

(b) Compliance with Code. — Regulations prescribed under this section shall be consistent with the International

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Safety Management Code with respect to vessels engaged on a foreign voyage.

* * *

46 U.S.C. § 3204

§ 3204. Implementation of safety management system

(a) Safety management plan. — Each responsible person shall establish and submit to the Secretary for approval a safety management plan describing how that person and vessels of the person to which this chapter applies will comply with the regulations prescribed under section 3203(a) of this title.

(b) Approval. — Upon receipt of a safety management plan submitted under subsection (a), the Secretary shall review the plan and approve it if the Secretary determines that it is consistent with and will assist in implementing the safety management system established under section 3203.

(c) Prohibition on vessel operation. — A vessel to which this chapter applies under section 3202(a) may not be operated without having on board a Safety Management Certificate and a copy of a Document of Compliance issued for the vessel under section 3205 of this title.

* * *

*Appendix E***46 U.S.C. § 3205****§ 3205. Certification**

(a) Issuance of certificate and document. — After verifying that the responsible person for a vessel to which this chapter applies and the vessel comply with the applicable requirements under this chapter, the Secretary shall issue for the vessel, on request of the responsible person, a Safety Management Certificate and a Document of Compliance.

(b) Maintenance of certificate and document. — A Safety Management Certificate and a Document of Compliance issued for a vessel under this section shall be maintained by the responsible person for the vessel as required by the Secretary.

(c) Verification of compliance. — The Secretary shall —

(1) periodically review whether a responsible person having a safety management plan approved under section 3204(b) and each vessel to which the plan applies is complying with the plan; and

(2) revoke the Secretary's approval of the plan and each Safety Management Certificate and Document of Compliance issued to the person for a vessel to which the plan applies, if the Secretary determines that the person or a vessel to which the plan applies has not complied with the plan.

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(d) Enforcement. — At the request of the Secretary, the Secretary of the Treasury shall withhold or revoke the clearance required by section 4197 of the Revised Statutes (46 U.S.C. App. 91) of a vessel that is subject to this chapter under section 3202(a) of this title or to the International Safety Management Code, if the vessel does not have on board a Safety Management Certificate and a copy of a Document of Compliance for the vessel. Clearance may be granted on filing a bond or other surety satisfactory to the Secretary.

* * *

46 U.S.C. § 3303**§ 3303. Reciprocity for foreign vessels**

Except as provided in chapter 37 of this title, a foreign vessel of a country having inspection laws and standards similar to those of the United States and that has an unexpired certificate of inspection issued by proper authority of its respective country, is subject to an inspection to ensure that the condition of the vessel is as stated in its current certificate of inspection. A foreign country is considered to have inspection laws and standards similar to those of the United States when it is a party to an International Convention for Safety of Life at Sea to which the United States Government is currently a party. A foreign certificate of inspection may be accepted as evidence of lawful inspection only when presented by a vessel of a country that has by its laws accorded to vessels of the United States visiting that country the same privileges accorded to vessels of that country visiting the United States.

* * *

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46 U.S.C. § 3306

§ 3306. Regulations

(a) To carry out this part and to secure the safety of individuals and property on board vessels subject to inspection, the Secretary shall prescribe necessary regulations to ensure the proper execution of, and to carry out, this part in the most effective manner for —

(1) the design, construction, alteration, repair, and operation of those vessels, including superstructures, hulls, fittings, equipment, appliances, propulsion machinery, auxiliary, machinery, boilers, unfired pressure vessels, piping, electric installations, and accommodations for passengers and crew, sailing school instructors, and sailing school students;

(2) lifesaving equipment and its use;

(3) firefighting equipment, its use, and precautionary measures to guard against fire;

(4) inspections and tests related to paragraphs (1), (2), and (3) of this subsection; and

(5) the use of vessel stores and other supplies of a dangerous nature.

* * *

*Appendix E***46 U.S.C. § 3703****§ 3703. Regulations**

(a) The Secretary shall prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels to which this chapter applies, that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment. The Secretary may prescribe different regulations applicable to vessels engaged in the domestic trade, and also may prescribe regulations that exceed standards set internationally. Regulations prescribed by the Secretary under this subsection are in addition to regulations prescribed under other laws that may apply to any of those vessels. Regulations prescribed under this subsection shall include requirements about —

(1) superstructures, hulls, cargo holds or tanks, fittings, equipment, appliances, propulsion machinery, auxiliary machinery, and boilers;

(2) the handling or stowage of cargo, the manner of handling or stowage of cargo, and the machinery and appliances used in the handling or stowage;

(3) equipment and appliances for lifesaving, fire protection, and prevention and mitigation of damage to the marine environment;

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(4) the manning of vessels and the duties, qualifications, and training of the officers and crew;

(5) improvements in vessel maneuvering and stopping ability and other features that reduce the possibility of marine casualties;

(6) the reduction of cargo loss if a marine casualty occurs; and

(7) the reduction or elimination of discharges during ballasting, deballasting, tank cleaning, cargo handling, or other such activity.

(b) In prescribing regulations under subsection (a) of this section, the Secretary shall consider the types and grades of cargo permitted to be on board a tank vessel.

(c) In prescribing regulations under subsection (a) of this section, the Secretary shall establish procedures for consulting with, and receiving and considering the views of —

(1) interested departments, agencies, and instrumentalities of the United States Government;

(2) officials of State and local governments;

(3) representatives of port and harbor authorities and associations;

(4) representatives of environmental groups;
and

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(5) other interested parties knowledgeable or experienced in dealing with problems involving vessel safety, port and waterways safety, and protection of the marine environment.

* * *

46 U.S.C. § 3711

§ 3711. Evidence of compliance by foreign vessels

(a) A foreign vessel to which this chapter applies may operate on the navigable waters of the United States, or transfer oil or hazardous material in a port or place under the jurisdiction of the United States, only if the vessel has been issued a certificate of compliance by the Secretary. The Secretary may issue the certificate only after the vessel has been examined and found to be in compliance with this chapter and regulations prescribed under this chapter. The Secretary may accept any part of a certificate, endorsement, or document, issued by the government of a foreign country under a treaty, convention, or other international agreement to which the United States is a party, as a basis for issuing a certificate of compliance.

(b) A certificate issued under this section is valid for not more than 24 months and may be renewed as specified by the Secretary. In appropriate circumstances, the Secretary may issue a temporary certificate valid for not more than 30 days.

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(c) A certificate shall be suspended or revoked if the Secretary finds that the vessel does not comply with the conditions under which the certificate was issued.

* * *

46 U.S.C. § 6101

§ 6101. Marine casualties and reporting

(a) The Secretary shall prescribe regulations on the marine casualties to be reported and the manner of reporting. The regulations shall require reporting the following marine casualties:

(1) death of an individual.

(2) serious injury to an individual.

(3) material loss of property.

(4) material damage affecting the seaworthiness or efficiency of the vessel.

(5) significant harm to the environment.

(b) A marine casualty shall be reported within 5 days as provided in this part and regulations prescribed under this part. Each report filed under this section shall include information as to whether the use of alcohol contributed to the casualty.

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(d)(1) This part applies to a foreign vessel when involved in a marine casualty on the navigable waters of the United States.

(2) This part applies, to the extent consistent with generally recognized principles of international law, to a foreign vessel constructed or adapted to carry, or that carries, oil in bulk as cargo or cargo residue involved in a marine casualty described under subsection (a)(4) or (5) in waters subject to the jurisdiction of the United States, including the Exclusive Economic Zone.

* * *

46 U.S.C. § 6301**§ 6301. Investigation of marine casualties**

The Secretary shall prescribe regulations for the immediate investigation of marine casualties under this part to decide, as closely as possible —

(1) the cause of the casualty, including the cause of any death;

(2) whether an act of misconduct, incompetence, negligence, unskillfulness, or willful violation of law committed by any individual licensed, certificated, or documented under part E of this subtitle has contributed to the cause of the casualty, or to a death involved in the casualty, so that appropriate remedial action under chapter 77 of this title may be taken;

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(3) whether an act of misconduct, incompetence, negligence, unskillfulness, or willful violation of law committed by any person, including an officer, employee, or member of the Coast Guard, contributed to the cause of the casualty, or to a death involved in the casualty;

(4) whether there is evidence that an act subjecting the offender to a civil penalty under the laws of the United States has been committed, so that appropriate action may be undertaken to collect the penalty;

(5) whether there is evidence that a criminal act under the laws of the United States has been committed, so that the matter may be referred to appropriate authorities for prosecution; and

(6) whether there is need for new laws or regulations, or amendment or repeal of existing laws or regulations, to prevent the recurrence of the casualty.

* * *

46 U.S.C. § 7101**§ 7101. Issuing and classifying licenses and certificates of registry**

(a) Licenses and certificates of registry are established for individuals who are required to hold licenses or certificates under this subtitle.

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(b) Under regulations prescribed by the Secretary, the Secretary —

(1) issues the licenses and certificates of registry; and

(2) may classify the licenses and certificates of registry as provided in subsections (c) and (f) of this section, based on —

(A) the tonnage, means of propulsion, and horsepower of machine-propelled vessels;

(B) the waters on which vessels are to be operated; or

(C) other reasonable standards.

(c) The Secretary may issue licenses in the following classes to applicants found qualified as to age, character, habits of life, experience, professional qualifications, and physical fitness:

(1) masters, mates, and engineers.

(2) pilots.

(3) operators.

(4) radio officers.

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(d) In classifying individuals under subsection (c)(1) of this section, the Secretary shall establish, when possible, suitable career patterns and service and other qualifying requirements appropriate to the particular service or industry in which the individuals are engaged.

(e) An individual may be issued a license under subsection (c)(2) of this section only if the applicant —

(1) is at least 21 years of age;

(2) is of sound health and has no physical limitations that would hinder or prevent the performance of a pilot's duties;

(3) has a thorough physical examination each year while holding the license, except that this requirement does not apply to an individual who will serve as a pilot only on a vessel of less than 1,600 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title;

(4) demonstrates, to the satisfaction of the Secretary, that the applicant has the requisite general knowledge and skill to hold the license;

(5) demonstrates proficiency in the use of electronic aids to navigation;

(6) maintains adequate knowledge of the waters to be navigated and knowledge of

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regulations for the prevention of collisions in those waters;

(7) has sufficient experience, as decided by the Secretary, to evidence ability to handle any vessel of the type and size which the applicant may be authorized to pilot; and

(8) meets any other requirement the Secretary considers reasonable and necessary.

(f) The Secretary may issue certificates of registry in the following classes to applicants found qualified as to character, knowledge, skill, and experience:

(1) pursers.

(2) medical doctors.

(3) professional nurses.

(g) The Secretary may not issue a license or certificate of registry under this section unless an individual applying for the license or certificate makes available to the Secretary, under section 206(b)(7) of the National Driver Register Act of 1982 (23 U.S.C. 401 note), any information contained in the National Driver Register related to an offense described in section 205(a)(3)(A) or (B) of that Act committed by the individual.

(h) The Secretary may review the criminal record of an individual who applies for a license or certificate of registry under this section.

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(i) The Secretary shall require the testing of an individual who applies for issuance or renewal of a license or certificate of registry under this chapter for use of a dangerous drug in violation of law or Federal regulation.

* * *

46 U.S.C. § 7302**§ 7302. Issuing merchant mariners' documents and continuous discharge books**

(a) The Secretary shall issue a merchant mariner's document to an individual required to have that document under part F of this subtitle if the individual satisfies the requirements of this part. The document serves as a certificate of identification and as a certificate of service, specifying each rating in which the holder is qualified to serve on board vessels on which that document is required under part F.

* * *

46 U.S.C. § 7306**§ 7306. General requirements and classifications for able seamen**

(a) To qualify for an endorsement as able seaman authorized by this section, an applicant must provide satisfactory proof that the applicant —

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(1) is at least 18 years of age;

(2) has the service required by the applicable section of this part;

(3) is qualified professionally as demonstrated by an applicable examination or educational requirements; and

(4) is qualified as to sight, hearing, and physical condition to perform the seaman's duties.

(b) The classifications authorized for endorsement as able seaman are the following:

(1) able seaman — unlimited.

(2) able seaman — limited.

(3) able seaman — special.

(4) able seaman — offshore supply vessels.

(5) able seaman — sail.

(6) able seaman — fishing industry.

* * *

*Appendix E***46 U.S.C. § 7313****§ 7313. General requirements for members of engine departments**

(a) Classes of endorsement as qualified members of the engine department on vessels of at least 100 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title (except vessels operating on rivers or lakes (except the Great Lakes)) may be prescribed by regulation.

(b) The ratings of wiper and coal passer are entry ratings and are not ratings as qualified members of the engine department.

(c) An applicant for an endorsement as qualified member of the engine department must provide satisfactory proof that the applicant —

(1) has the service required by section 7314 of this title;

(2) is qualified professionally as demonstrated by an applicable examination; and

(3) is qualified as to sight, hearing, and physical condition to perform the member's duties.

* * *

*Appendix E***46 U.S.C. § 7317****§ 7317. Tankermen**

(a) The Secretary shall prescribe procedures, standards, and qualifications for the issuance of certificates or endorsements as tankerman, stating the types of oil or hazardous material that can be handled with safety to the vessel and the marine environment.

(b) An endorsement as tankerman shall indicate the grades or types of cargo the holder is qualified and authorized to handle with safety on board vessels.

* * *

46 U.S.C. § 8101**§ 8101. Complement of inspected vessels**

(a) The certificate of inspection issued to a vessel under part B of this subtitle shall state the complement of licensed individuals and (including lifeboatmen) considered by the Secretary to be necessary for safe operation. A manning requirement imposed on —

* * *

(3) a tank vessel shall consider the navigation, cargo handling, and maintenance functions of that vessel for protection of life, property, and the environment.

* * *

*Appendix E***46 U.S.C. § 8104****§ 8104. Watches**

* * *

(n) On a tanker, a licensed individual or seaman may not be permitted to work more than 15 hours in any 24-hour period, or more than 36 hours in any 72-hour period, except in an emergency or a drill. In this subsection, "work" includes any administrative duties associated with the vessel whether performed on board the vessel or onshore.

* * *

46 U.S.C. § 8304**§ 8304. Implementing the Officers' Competency
Certificates Convention, 1936**

(a) In this section, "high seas" means waters seaward of the Boundary Line.

(b) The Officers' Competency Certificates Convention, 1936 (International Labor Organization Draft Convention Numbered 53, on the minimum requirement of professional capacity for masters and officers on board merchant vessels), as ratified by the President on September 1, 1938, with understandings appended, and this section apply to a documented vessel operating on the high seas except —

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(1) a public vessel;

(2) a wooden vessel of primitive build, such as a dhow or junk;

(3) a barge; and

(4) a vessel of less than 200 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title.

(c) A person may not engage or employ an individual to serve as, and an individual may not serve as, a master, mate, or engineer on a vessel to which this section applies, if the individual does not have a license issued under section 7101 of this title authorizing service in the capacity in which the individual is to be engaged or employed.

(d) A person (including an individual) violating this section is liable to the United States Government for a civil penalty of \$100.

(e) A license issued to an individual to whom this section applies is a certificate of competency.

(f) A designated official may detain a vessel to which this section applies (by written order served on the owner, charterer, managing operator, agent, master, or individual in charge of the vessel) when there is reason to believe that the vessel is about to proceed from a port of the United States to

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a the high seas in violation of this section or a provision of the convention described in subsection (b) of this section. The vessel may be detained until the vessel complies with this section. Clearance may not be granted to a vessel ordered detained under this section.

(g) A foreign vessel to which the convention described in subsection (b) of this section applies, on the navigable waters of the United States, is subject to detention under subsection (f) of this section, and to an examination that may be necessary to decide if there is compliance with the convention.

(h) The owner, charterer, managing operator, agent, master, or individual in charge of a vessel detained under subsection (f) or (g) of this section may appeal the order within 5 days as provided by regulation.

(i) An officer or employee of the Customs Service may be designated to enforce this section.

* * *

46 U.S.C. § 8501**§ 8501. State regulation of pilots**

(a) Except as otherwise provided in this subtitle, pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States.

* * *

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46 U.S.C. § 8502

§ 8502. Federal pilots required

(a) Except as provided in subsections (g) and (i) of this section, a coastwise seagoing vessel shall be under the direction and control of a pilot licensed under section 7101 of this title if the vessel is —

(1) not sailing on register;

(2) underway;

(3) not on the high seas; and

(4)(A) propelled by machinery and subject to inspection under part B of this subtitle; or

(B) subject to inspection under chapter 37 of this title.

* * *

46 U.S.C. § 8702

§ 8702. Certain crew requirements

* * *

(b) A vessel may operate only if at least —

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(1) 75 percent of the crew in each department on board is able to understand any order spoken by the officers

* * *

46 U.S.C. § 8703**§ 8703. Tankermen on tank vessels**

(a) A vessel of the United States to which Chapter 37 of this title applies, that has on board oil or hazardous material in bulk as cargo or cargo residue, shall have a specified number of the crew certified as tankermen as required by the Secretary. This requirement shall be noted on the certificate of inspection issued to the vessel.

[(b) Repealed. Pub.L. 98-557, § 18, Oct. 30, 1984, 98 Stat. 2869]

(c) A vessel to which section 3702(b) of this title applies shall have on board as a crewmember in charge of the transfer operation an individual certified as a tankerman (qualified for the grade of fuel transferred), unless a master, mate, pilot, engineer, or operator licensed under section 7101 of this title is present in charge of the transfer. If the vessel does not have that individual on board, chapter 37 of this title applies to the vessel.

* * *

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46 U.S.C. § 9101

§ 9101. Standards for foreign tank vessels

(a)(1) The Secretary shall evaluate the manning, training, qualification, and watchkeeping standards of a foreign country that issues documentation for any vessel to which chapter 37 of this title applies —

(A) on a periodic basis; and

(B) when the vessel is involved in a marine casualty required to be reported under section 6101(a)(4) or (5) of this title.

(2) After each evaluation made under paragraph (1) of this subsection, the Secretary shall determine whether —

(A) the foreign country has standards for licensing and certification of seamen that are at least equivalent to United States law or international standards accepted by the United States; and

(B) those standards are being enforced.

(3) If the Secretary determines under this subsection that a country has failed to maintain or enforce standards at least equivalent to United States law or international standards accepted by the United States, the Secretary shall prohibit vessels issued documentation by that country from entering the United States until the Secretary determines those standards have been established and are being enforced.

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(4) The Secretary may allow provisional entry of a vessel prohibited from entering the United States under paragraph (3) of this subsection if —

(A) the owner or operator of the vessel establishes, to the satisfaction of the Secretary, that the vessel is not unsafe or a threat to the marine environment; or

(B) the entry is necessary for the safety of the vessel or individuals on the vessel.

(b) A foreign vessel to which chapter 37 of this title applies that has on board oil or hazardous material in bulk as cargo or cargo residue shall have a specified number of personnel certified as tankerman or equivalent, as required by the Secretary, when the vessel transfers oil or hazardous material in a port or place subject to the jurisdiction of the United States. The requirement of this subsection shall be noted in applicable terminal operating procedures. A transfer operation may take place only if the crewmember in charge is capable of clearly understanding instructions in English.

* * *

46 U.S.C. § 9102**§ 9102. Standards for tank vessels of the United States**

(a) The Secretary shall prescribe standards for the manning of each vessel of the United States to which chapter 37 of this title applies, related to the duties, qualifications,

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and training of the officers and crew of the vessel, including standards related to —

(1) instruction in vessel and cargo handling and vessel navigation under normal operating conditions in coastal and confined waters and on the high seas;

(2) instruction in vessel and cargo handling and vessel navigation in emergency situations and under marine casualty or potential casualty conditions;

(3) qualifications for licenses by specific type and size of vessels;

(4) qualifications for licenses by use of simulators for the practice or demonstration of marine-oriented skills;

(5) minimum health and physical fitness criteria for various grades of licenses and certificates;

(6) periodic retraining and special training for upgrading positions, changing vessel type or size, or assuming new responsibilities;

(7) decisions about licenses and certificates, conditions of licensing or certification, and periods of licensing or certification by reference to experience, amount of training completed, and regular performance testing; and

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(8) instruction in vessel maintenance functions.

(b) The Secretary shall waive the application of criteria required by subsection (a)(5) of this section for an individual having a license or certificate (including a renewal of the license or certificate) in effect on October 17, 1978. When the waiver is granted, the Secretary may prescribe conditions for the license or certificate and its renewal, as the Secretary decides are reasonable and necessary for the safety of a vessel on which the individual may be employed.

* * * *

APPENDIX F — OPA '90 PUBLIC LAW PROVISIONS

PUBLIC LAW 101-380 — AUG. 18, 1990

OIL POLLUTION ACT OF 1990

* * *

TITLE II — CONFORMING AMENDMENTS

SEC. 2001. INTERVENTION ON THE HIGH SEAS ACT.

Section 17 of the Intervention on the High Seas Act (33 U.S.C. 1486) is amended to read as follows:

“SEC. 17. The Oil Spill Liability Trust Fund shall be available to the Secretary for actions taken under sections 5 and 7 of this Act.”

SEC. 2002. FEDERAL WATER POLLUTION CONTROL ACT.

(a) APPLICATION. — Subsections (f), (g), (h), and (i) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321) shall not apply with respect to any incident for which liability is established under section 1002 of this Act.

(b) CONFORMING AMENDMENTS. — Section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321) is amended as follows:

(1) Subsection (i) is amended by striking “(1)” after “(i)” and by striking paragraphs (2) and (3).

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(2) Subsection (k) is repealed. Any amounts remaining in the revolving fund established under that subsection shall be deposited in the Fund. The Fund shall assume all liability incurred by the revolving fund established under that subsection.

(3) Subsection (l) is amended by striking the second sentence.

(4) Subsection (p) is repealed.

(5) The following is added at the end thereof:

“(s) The Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509) shall be available to carry out subsections (b), (c), (d), (j), and (l) as those subsections apply to discharges, and substantial threats of discharges, of oil. Any amounts received by the United States under this section shall be deposited in the Oil Spill Liability Trust Fund.”.

SEC. 2003. DEEPWATER PORT ACT.

(a) **CONFORMING AMENDMENTS.** — The Deepwater Port Act of 1974 (33 U.S.C. 1502 et seq.) is amended —

(1) in section 4(c)(1) by striking “section 18(l) of this Act;” and inserting “section 1016 of the Oil Pollution Act of 1990”; and

(2) by striking section 18.

*Appendix F***(b) AMOUNTS REMAINING IN DEEPWATER PORT FUND. —**

Any amounts remaining in the Deepwater Port Liability Fund established under section 18(f) of the Deepwater Port Act of 1974 (33 U.S.C. 1517(f)) shall be deposited in the Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509). The Oil Spill Liability Trust Fund shall assume all liability incurred by the Deepwater Port Liability Fund.

**SEC. 2004. OUTER CONTINENTAL SHELF LANDS
ACT AMENDMENTS OF 1978.**

Title III of the Outer Continental Shelf Lands Act Amendments of 1978 (43 U.S.C. 1811-1824) is repealed. Any amounts remaining in the Offshore Oil Pollution Compensation Fund established under section 302 of that title (43 U.S.C. 1812) shall be deposited in the Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509). The Oil Spill Liability Trust Fund shall assume all liability incurred by the Offshore Oil Pollution Compensation Fund.

**TITLE III — INTERNATIONAL OIL
POLLUTION PREVENTION AND REMOVAL****SEC. 3001. SENSE OF CONGRESS REGARDING
PARTICIPATION IN INTERNATIONAL
REGIME.**

It is the sense of the Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as

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effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents.

* * *

TITLE IV — PREVENTION AND REMOVAL**Subtitle A — Prevention****SEC. 4101. REVIEW OF ALCOHOL AND DRUG ABUSE AND OTHER MATTERS IN ISSUING LICENSES, CERTIFICATES OF REGISTRY, AND MERCHANT MARINERS' DOCUMENTS.**

(a) LICENSES AND CERTIFICATES OF REGISTRY. — Section 7101 of title 46, United States Code, is amended by adding at the end the following:

“(g) The Secretary may not issue a license or certificate of registry under this section unless an individual applying for the license or certificate makes available to the Secretary, under section 206(b)(7) of the National Driver Register Act of 1982 (23 U.S.C. 401 note), any information contained in the National Driver Register related to an offense described in section 205(a)(3) (A) or (B) of that Act committed by the individual.

“(h) The Secretary may review the criminal record of an individual who applies for a license or certificate of registry under this section.

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“(i) The Secretary shall require the testing of an individual who applies for issuance or renewal of a license or certificate of registry under this chapter for use of a dangerous drug in violation of law or Federal regulation.”.

(b) **MERCHANT MARINERS' DOCUMENTS.** — Section 7302 of title 46, United States Code, is amended by adding at the end the following:

“(c) The Secretary may not issue a merchant mariner's document under this chapter unless the individual applying for the document makes available to the Secretary, under section 206(b)(7) of the National Driver Register Act of 1982 (23 U.S.C. 401 note), any information contained in the National Driver Register related to an offense described in section 205(a)(3) (A) or (B) of that Act committed by the individual.

“(d) The Secretary may review the criminal record of an individual who applies for a merchant mariner's document under this section.

“(e) The Secretary shall require the testing of an individual applying for issuance or renewal of a merchant mariner's document under this chapter for the use of a dangerous drug in violation of law or Federal regulation.”.

*Appendix F***SEC. 4102. TERM OF LICENSES, CERTIFICATES OF REGISTRY, AND MERCHANT MARINERS' DOCUMENTS; CRIMINAL RECORD REVIEWS IN RENEWALS.**

(a) **LICENSES.** — Section 7106 of title 46, United States Code, is amended by inserting “and may be renewed for additional 5-year periods” after “is valid for 5 years”.

(b) **CERTIFICATES OF REGISTRY.** — Section 7107 of title 46, United States Code, is amended by striking “is not limited in duration.” and inserting “is valid for 5 years and may be renewed for additional 5-year periods.”.

(c) **MERCHANT MARINERS' DOCUMENTS.** — Section 7302 of title 46, United States Code, is amended by adding at the end the following:

“(f) A merchant mariner's document issued under this chapter is valid for 5 years and may be renewed for additional 5-year periods.”.

(d) **TERMINATION OF EXISTING LICENSES, CERTIFICATES, AND DOCUMENTS.** — A license, certificate of registry, or merchant mariner's document issued before the date of the enactment of this section terminates on the day it would have expired if —

(1) subsections (a), (b), and (c) were in effect on the date it was issued; and

(2) it was renewed at the end of each 5-year period under section 7106, 7107, or 7302 of title 46, United States Code.

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(e) **CRIMINAL RECORD REVIEW IN RENEWALS OF LICENSES AND CERTIFICATES OF REGISTRY. —**

(1) **IN GENERAL.** — Section 7109 of title 46, United States Code, is amended to read as follows:

“§ 7109. Review of criminal records

“The Secretary may review the criminal record of each holder of a license or certificate of registry issued under this part who applies for renewal of that license or certificate of registry.”.

(2) **CLERICAL AMENDMENT.** — The analysis for chapter 71 of title 46, United States Code, is amended by striking the item relating to section 7109 and inserting the following:

“7109. Review of criminal records.”.

SEC. 4103. SUSPENSION AND REVOCATION OF LICENSES, CERTIFICATES OF REGISTRY, AND MERCHANT MARINERS' DOCUMENTS FOR ALCOHOL AND DRUG ABUSE.

(a) **AVAILABILITY OF INFORMATION IN NATIONAL DRIVER REGISTER. —**

(1) **IN GENERAL.** — Section 7702 of title 46, United States Code, is amended by adding at the end the following:

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“(c)(1) The Secretary shall request a holder of a license, certificate of registry, or merchant mariner’s document to make available to the Secretary, under section 206(b)(4) of the National Driver Register Act of 1982 (23 U.S.C. 401 note), all information contained in the National Driver Register related to an offense described in section 205(a)(3) (A) or (B) of that Act committed by the individual.

“(2) The Secretary shall require the testing of the holder of a license, certificate of registry, or merchant mariner’s document for use of alcohol and dangerous drugs in violation of law or Federal regulation. The testing may include preemployment (with respect to dangerous drugs only), periodic, random, reasonable cause, and post accident testing.

“(d)(1) The Secretary may temporarily, for not more than 45 days, suspend and take possession of the license, certificate of registry, or merchant mariner’s document held by an individual if, when acting under the authority of that license, certificate, or document —

“(A) that individual performs a safety sensitive function on a vessel, as determined by the Secretary; and

“(B) there is probable cause to believe that the individual —

“(i) has performed the safety sensitive function in violation of law or Federal regulation regarding use of alcohol or a dangerous drug;

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“(ii) has been convicted of an offense that would prevent the issuance or renewal of the license, certificate, or document; or

“(iii) within the 3-year period preceding the initiation of a suspension proceeding, has been convicted of an offense described in section 205(a)(3) (A) or (B) of the National Driver Register Act of 1982.

“(2) If a license, certificate, or document is temporarily suspended under this section, an expedited hearing under subsection (a) of this section shall be held within 30 days after the temporary suspension.”.

(2) DEFINITION OF DANGEROUS DRUG. —

(A) Section 2101 of title 46, United States Code, is amended by inserting after paragraph (8) the following new paragraph:

“(8a) ‘dangerous drug’ means a narcotic drug, a controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802)).”.

(B) Sections 7503(a) and 7704(a) of title 46, United States Code, are repealed.

(b) BASES FOR SUSPENSION OR REVOCATION. — Section 7703 of title 46, United States Code, is amended to read as follows:

*Appendix F***“§ 7703. Bases for suspension or revocation**

“A license, certificate of registry, or merchant mariner’s document issued by the Secretary may be suspended or revoked if the holder —

“(1) when acting under the authority of that license, certificate, or document —

“(A) has violated or fails to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters; or

“(B) has committed an act of incompetence, misconduct, or negligence;

“(2) is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner’s document; or

“(3) within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 205(a)(3) (A) or (B) of the National Driver Register Act of 1982 (23 U.S.C. 401 note).”.

(c) **TERMINATION OF REVOCATION.** — Section 7701(c) of title 46, United States Code, is amended to read as follows:

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“(c) When a license, certificate of registry, or merchant mariner’s document has been revoked under this chapter, the former holder may be issued a new license, certificate of registry, or merchant mariner’s document only after —

“(1) the Secretary decides, under regulations prescribed by the Secretary, that the issuance is compatible with the requirement of good discipline and safety at sea; and

“(2) the former holder provides satisfactory proof that the bases for revocation are no longer valid.”.

**SEC. 4104. REMOVAL OF MASTER OR
INDIVIDUAL IN CHARGE.**

Section 8101 of title 46, United States Code, is amended by adding at the end the following:

“(i) When the 2 next most senior licensed officers on a vessel reasonably believe that the master or individual in charge of the vessel is under the influence of alcohol or a dangerous drug and is incapable of commanding the vessel, the next most senior master, mate, or operator licensed under section 7101(c) (1) or (3) of this title shall —

“(1) temporarily relieve the master or individual in charge;

“(2) temporarily take command of the vessel;

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“(3) in the case of a vessel required to have a log under chapter 113 of this title, immediately enter the details of the incident in the log; and

“(4) report those details to the Secretary —

“(A) by the most expeditious means available; and

“(B) in written form transmitted within 12 hours after the vessel arrives at its next port.”.

SEC. 4105. ACCESS TO NATIONAL DRIVER REGISTER.

(a) ACCESS TO REGISTER. — Section 206(b) of the National Driver Register Act of 1982 (23 U.S.C. 401 note) is amended —

(1) by redesignating the second paragraph (5) (as added to the end of that section by section 4(b)(1) of the Rail Safety Improvement Act of 1988) as paragraph (6); and

(2) by adding at the end the following:

“(7)(A) Any individual who holds or who has applied for a license or certificate of registry under section 7101 of title 46, United States Code, or a merchant mariner’s document under section 7302 of title 46, United States Code, may request the chief driver licensing official of a State to

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transmit to the Secretary of the department in which the Coast Guard is operating in accordance with subsection (a) information regarding the motor vehicle driving record of the individual.

“(B) The Secretary —

“(i) may receive information transmitted by the chief driver licensing official of a State pursuant to a request under subparagraph (A);

“(ii) shall make the information available to the individual for review and written comment before denying, suspending, or revoking the license, certificate of registry, or merchant mariner's document of the individual based on that information and before using that information in any action taken under chapter 77 of title 46, United States Code; and

“(iii) may not otherwise divulge or use that information, except for the purposes of section 7101, 7302, or 7703 of title 46, United States Code.

“(C) Information regarding the motor vehicle driving record of an individual may not be transmitted to the Secretary under this paragraph if the information was entered in the Register more than 3 years before the date of the request for the information, unless the information relates to revocations or suspensions that are still in effect on the date of the request. Information submitted to the Register by States under the Act of July 14, 1960 (74 Stat. 526), or under this title shall

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be subject to access for the purpose of this paragraph during the transition to the Register described under section 203(c) of this title.”.

(b) CONFORMING AMENDMENTS. —

(1) REVIEW OF INFORMATION RECEIVED FROM REGISTER. — Chapter 75 of title 46, United States Code, is amended by adding at the end the following:

“§ 7505. Review of information in National Driver Register

“The Secretary shall make information received from the National Driver Register under section 206(b)(7) of the National Driver Register Act of 1982 (23 U.S.C. 401 note) available to an individual for review and written comment before denying, suspending, revoking, or taking any other action relating to a license, certificate of registry, or merchant mariner’s document authorized to be issued for that individual under this part, based on that information.”.

(2) PENALTY FOR NEGLIGENT OPERATION OF VESSEL. — Section 2302(c) of title 46, United States Code, is amended by striking “intoxicated” and inserting “under the influence of alcohol, or a dangerous drug in violation of a law of the United States”.

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(c) CLERICAL AMENDMENT. — The analysis for chapter 75 of title 46, United States Code, is amended by adding at the end the following:

“7505. Review of information in National Driver Register.”.

SEC. 4106. MANNING STANDARDS FOR FOREIGN TANK VESSELS.

(a) STANDARDS FOR FOREIGN TANK VESSELS. — Section 9101(a) of title 46, United States Code, is amended to read as follows:

“(a)(1) The Secretary shall evaluate the manning, training, qualification, and watchkeeping standards of a foreign country that issues documentation for any vessel to which chapter 37 of this title applies —

“(A) on a periodic basis; and

“(B) when the vessel is involved in a marine casualty required to be reported under section 6101(a) (4) or (5) of this title.

“(2) After each evaluation made under paragraph (1) of this subsection, the Secretary shall determine whether —

“(A) the foreign country has standards for licensing and certification of seamen that are at least equivalent to United States law or international standards accepted by the United States; and

“(B) those standards are being enforced.

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“(3) If the Secretary determines under this subsection that a country has failed to maintain or enforce standards at least equivalent to United States law or international standards accepted by the United States, the Secretary shall prohibit vessels issued documentation by that country from entering the United States until the Secretary determines those standards have been established and are being enforced.

“(4) The Secretary may allow provisional entry of a vessel prohibited from entering the United States under paragraph (3) of this subsection if —

“(A) the owner or operator of the vessel establishes, to the satisfaction of the Secretary, that the vessel is not unsafe or a threat to the marine environment; or

“(B) the entry is necessary for the safety of the vessel or individuals on the vessel.”.

(b) REPORTING MARINE CASUALTIES. —

(1) REPORTING REQUIREMENT. — Section 6101(a) of title 46, United States Code, is amended by adding at the end the following:

“(5) significant harm to the environment.”.

(2) APPLICATION TO FOREIGN VESSELS. — Section 6101(d) of title 46, United States Code, is amended —

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(A) by inserting "(1)" before "This part"; and

(B) by adding at the end the following:

"(2) This part applies, to the extent consistent with generally recognized principles of international law, to a foreign vessel constructed or adapted to carry, or that carries, oil in bulk as cargo or cargo residue involved in a marine casualty described under subsection (a) (4) or (5) in waters subject to the jurisdiction of the United States, including the Exclusive Economic Zone."

(c) TECHNICAL AND CONFORMING AMENDMENTS. — Section 9(a) of the Ports and Waterways Safety Act (33 U.S.C. 1228(a)) is amended —

(1) in the matter preceding paragraph (1), by striking "section 4417a of the Revised Statutes, as amended," and inserting "chapter 37 of title 46, United States Code,";

(2) in paragraph (2), by striking "section 4417a of the Revised Statutes, as amended," and inserting "chapter 37 of title 46, United States Code,"; and

(3) in paragraph (5), by striking "section 4417a(11) of the Revised Statutes, as amended," and inserting "section 9101 of title 46, United States Code,".

*Appendix F***SEC. 4107. VESSEL TRAFFIC SERVICE SYSTEMS.**

(a) **IN GENERAL.** — Section 4(a) of the Ports and Waterways Safety Act (33 U.S.C. 1223(a)) is amended —

(1) by striking “Secretary may —” and inserting “Secreary —”;

(2) in paragraph (1) by striking “establish, operate, and maintain” and inserting “may construct, operate, maintain, improve, or expand”;

(3) in paragraph (2) by striking “require” and inserting “shall require appropriate”;

(4) in paragraph (3) by inserting “may” before “require”;

(5) in paragraph (4) by inserting “may” before “control”; and

(6) in paragraph (5) by inserting “may” before “require”.

(b) **DIRECTION OF VESSEL MOVEMENT.** —

(1) **STUDY.** — The Secretary shall conduct a study —

(A) of whether the Secretary should be given additional authority to direct the movement of vessels on navigable

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waters and should exercise such authority; and

(B) to determine and prioritize the United States ports and channels that are in need of new, expanded, or improved vessel traffic service systems, by evaluating —

(i) the nature, volume, and frequency of vessel traffic;

(ii) the risks of collisions, spills, and damages associated with that traffic;

(iii) the impact of installation, expansion, or improvement of a vessel traffic service system; and

(iv) all other relevant costs and data.

(2) REPORT. — Not later than 1 year after the date of the enactment of this Act, the Secretary shall submit to the Congress a report on the results of the study conducted under paragraph (1) and recommendations for implementing the results of that study.

*Appendix F***SEC. 4108. GREAT LAKES PILOTAGE.**

(a) **INDIVIDUALS WHO MAY SERVE AS PILOT ON UNDESIGNATED GREAT LAKE WATERS.** — Section 9302(b) of title 46, United States Code, is amended to read as follows:

“(b) A member of the complement of a vessel of the United States operating on register or of a vessel of Canada may serve as the pilot required on waters not designated by the President if the member is licensed under section 7101 of this title, or under equivalent provisions of Canadian law, to direct the navigation of the vessel on the waters being navigated.”.

(b) **PENALTIES.** — Section 9308 of title 46, United States Code, is amended in each of subsections (a), (b), and (c) by striking “\$500” and inserting “no more than \$10,000”.

SEC. 4109. PERIODIC GAUGING OF PLATING THICKNESS OF COMMERCIAL VESSELS.

Not later than 1 year after the date of the enactment of this Act, the Secretary shall issue regulations for vessels constructed or adapted to carry, or that carry, oil in bulk as cargo or cargo residue —

(1) establishing minimum standards for plating thickness; and

(2) requiring, consistent with generally recognized principles of international law, periodic

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gauging of the plating thickness of all such vessels over 30 years old operating on the navigable waters or the waters of the exclusive economic zone.

SEC. 4110. OVERFILL AND TANK LEVEL OR PRESSURE MONITORING DEVICES.

(a) **STANDARDS.** — Not later than 1 year after the date of the enactment of this Act, the Secretary shall establish, by regulation, minimum standards for devices for warning persons of overfills and tank levels of oil in cargo tanks and devices for monitoring the pressure of oil cargo tanks.

(b) **USE.** — Not later than 1 year after the date of the enactment of this Act, the Secretary shall issue regulations establishing, consistent with generally recognized principles of international law, requirements concerning the use of —

(1) overfill devices, and

(2) tank level or pressure monitoring devices, which are referred to in subsection (a) and which meet the standards established by the Secretary under subsection (a), on vessels constructed or adapted to carry, or that carry, oil in bulk as cargo or cargo residue on the navigable waters and the waters of the exclusive economic zone.

SEC. 4111. STUDY ON TANKER NAVIGATION SAFETY STANDARDS.

(a) **IN GENERAL.** — Not later than 1 year after the date of enactment of this Act, the Secretary shall initiate a study to

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determine whether existing laws and regulations are adequate to ensure the safe navigation of vessels transporting oil or hazardous substances in bulk on the navigable waters and the waters of the exclusive economic zone.

(b) **CONTENT.** — In conducting the study required under subsection (a), the Secretary shall —

(1) determine appropriate crew sizes on tankers;

(2) evaluate the adequacy of qualifications and training of crewmembers on tankers;

(3) evaluate the ability of crewmembers on tankers to take emergency actions to prevent or remove a discharge of oil or a hazardous substance from their tankers;

(4) evaluate the adequacy of navigation equipment and systems on tankers (including sonar, electronic chart display, and satellite technology);

(5) evaluate and test electronic means of position-reporting and identification on tankers, consider the minimum standards suitable for equipment for that purpose, and determine whether to require that equipment on tankers;

(6) evaluate the adequacy of navigation procedures under different operating conditions,

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including such variables as speed, daylight, ice, tides, weather, and other conditions;

(7) evaluate whether areas of navigable waters and the exclusive economic zone should be designated as zones where the movement of tankers should be limited or prohibited;

(8) evaluate whether inspection standards are adequate;

(9) review and incorporate the results of past studies, including studies conducted by the Coast Guard and the Office of Technology Assessment;

(10) evaluate the use of computer simulator courses for training bridge officers and pilots of vessels transporting oil or hazardous substances on the navigable waters and waters of the exclusive economic zone, and determine the feasibility and practicality of mandating such training;

(11) evaluate the size, cargo capacity, and flag nation of tankers transporting oil or hazardous substances on the navigable waters and the waters of the exclusive economic zone —

(A) identifying changes occurring over the past 20 years in such size and cargo capacity and in vessel navigation and technology; and

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(B) evaluating the extent to which the risks or difficulties associated with tanker navigation, vessel traffic control, accidents, oil spills, and the containment and cleanup of such spills are influenced by or related to an increase in tanker size and cargo capacity; and

(12) evaluate and test a program of remote alcohol testing for masters and pilots aboard tankers carrying significant quantities of oil.

(c) **REPORT.** — Not later than 2 years after the date of enactment of this Act, the Secretary shall transmit to the Congress a report on the results of the study conducted under subsection (a), including recommendations for implementing the results of that study.

SEC. 4112. DREDGE MODIFICATION STUDY.

(a) **STUDY.** — The Secretary of the Army shall conduct a study and demonstration to determine the feasibility of modifying dredges to make them usable in removing discharges of oil and hazardous substances.

(b) **REPORT.** — Not later than 1 year after the date of enactment of this Act, the Secretary of the Army shall submit to the Congress a report on the results of the study conducted under subsection (a) and recommendations for implementing the results of that study.

*Appendix F***SEC. 4113. USE OF LINERS.**

(a) **STUDY.** — The President shall conduct a study to determine whether liners or other secondary means of containment should be used to prevent leaking or to aid in leak detection at onshore facilities used for the bulk storage of oil and located near navigable waters.

(b) **REPORT.** — Not later than 1 year after the date of enactment of this Act, the President shall submit to the Congress a report on the results of the study conducted under subsection (a) and recommendations to implement the results of the study.

(c) **IMPLEMENTATION.** — Not later than 6 months after the date the report required under subsection (b) is submitted to the Congress, the President shall implement the recommendations contained in the report.

SEC. 4114. TANK VESSEL MANNING.

(a) **RULEMAKING.** — In order to protect life, property, and the environment, the Secretary shall initiate a rulemaking proceeding within 180 days after the date of the enactment of this Act to define the conditions under, and designate the waters upon, which tank vessels subject to section 3703 of title 46, United States Code, may operate in the navigable waters with the auto-pilot engaged or with an unattended engine room.

(b) **WATCHES.** — Section 8104 of title 46, United States Code, is amended by adding at the end the following new subsection:

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“(n) On a tanker, a licensed individual or seaman may not be permitted to work more than 15 hours in any 24-hour period, or more than 36 hours in any 72-hour period, except in an emergency or a drill. In this subsection, ‘work’ includes any administrative duties associated with the vessel whether performed on board the vessel or onshore.”.

(c) MANNING REQUIREMENT. — Section 8101(a) of title 46, United States Code, is amended —

(1) by striking “and” at the end of paragraph (1);

(2) by striking the period at the end of paragraph (2) and inserting “; and”; and

(3) by adding at the end the following new paragraph:

“(3) a tank vessel shall consider the navigation, cargo handling, and maintenance functions of that vessel for protection of life, property, and the environment.”.

(d) STANDARDS. — Section 9102(a) of title 46, United States Code, is amended —

(1) by striking “and” at the end of paragraph (6);

(2) by striking the period at the end of paragraph (7) and inserting “; and”; and

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(3) by adding at the end the following new paragraph:

“(8) instruction in vessel maintenance functions.”.

(e) RECORDS. — Section 7502 of title 46, United States Code, is amended by striking “maintain records” and inserting “maintain computerized records”.

SEC. 4115. ESTABLISHMENT OF DOUBLE HULL REQUIREMENT FOR TANK VESSELS.

(a) DOUBLE HULL REQUIREMENT. — Chapter 37 of title 46, United States Code, is amended by inserting after section 3703 the following new section:

“§ 3703a. Tank vessel construction standards

“(a) Except as otherwise provided in this section, a vessel to which this chapter applies shall be equipped with a double hull —

“(1) if it is constructed or adapted to carry, or carries, oil in bulk as cargo or cargo residue; and

“(2) when operating on the waters subject to the jurisdiction of the United States, including the Exclusive Economic Zone.

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“(b) This section does not apply to —

“(1) a vessel used only to respond to a discharge of oil or a hazardous substance;

“(2) a vessel of less than 5,000 gross tons equipped with a double containment system determined by the Secretary to be as effective as a double hull for the prevention of a discharge of oil; or

“(3) before January 1, 2015 —

“(A) a vessel unloading oil in bulk at a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.); or

“(B) a delivering vessel that is offloading in lightering activities —

“(i) within a lightering zone established under section 3715(b)(5) of this title; and

“(ii) more than 60 miles from the baseline from which the territorial sea of the United States is measured.

“(c)(1) In this subsection, the age of a vessel is determined from the later of the date on which the vessel —

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“(A) is delivered after original construction;

“(B) is delivered after completion of a major conversion; or

“(C) had its appraised salvage value determined by the Coast Guard and is qualified for documentation under section 4136 of the Revised Statutes of the United States (46 App. U.S.C. 14).

“(2) A vessel of less than 5,000 gross tons for which a building contract or contract for major conversion was placed before June 30, 1990, and that is delivered under that contract before January 1, 1994, and a vessel of less than 5,000 gross tons that had its appraised salvage value determined by the Coast Guard before June 30, 1990, and that qualifies for documentation under section 4136 of the Revised Statutes of the United States (46 App. U.S.C. 14) before January 1, 1994, may not operate in the navigable waters or the Exclusive Economic Zone of the United States after January 1, 2015, unless the vessel is equipped with a double hull or with a double containment system determined by the Secretary to be as effective as a double hull for the prevention of a discharge of oil.

“(3) A vessel for which a building contract or contract for major conversion was placed before June 30, 1990, and that is delivered under that contract before January 1, 1994, and a vessel that had its appraised salvage value determined by the Coast Guard before June 30, 1990, and that qualifies for documentation under section 4136 of the Revised Statutes

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of the United States (46 App. U.S.C. 14) before January 1, 1994, may not operate in the navigable waters or Exclusive Economic Zone of the United States unless equipped with a double hull —

“(A) in the case of a vessel of at least 5,000 gross tons but less than 15,000 gross tons —

“(i) after January 1, 1995, if the vessel is 40 years old or older and has a single hull, or is 45 years old or older and has a double bottom or double sides;

“(ii) after January 1, 1996, if the vessel is 39 years old or older and has a single hull, or is 44 years old or older and has a double bottom or double sides;

“(iii) after January 1, 1997, if the vessel is 38 years old or older and has a single hull, or is 43 years old or older and has a double bottom or double sides;

“(iv) after January 1, 1998, if the vessel is 37 years old or older and has a single hull, or is 42 years old or older and has a double bottom or double sides;

“(v) after January 1, 1999, if the vessel is 36 years old or older and has a single hull, or is 41 years old or older and has a double bottom or double sides;

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“(vi) after January 1, 2000, if the vessel is 35 years old or older and has a single hull, or is 40 years old or older and has a double bottom or double sides; and

“(vii) after January 1, 2005, if the vessel is 25 years old or older and has a single hull, or is 30 years old or older and has a double bottom or double sides;

“(B) in the case of a vessel of at least 15,000 gross tons but less than 30,000 gross tons —

“(i) after January 1, 1995, if the vessel is 40 years old or older and has a single hull, or is 45 years old or older and has a double bottom or double sides;

“(ii) after January 1, 1996, if the vessel is 38 years old or older and has a single hull, or is 43 years old or older and has a double bottom or double sides;

“(iii) after January 1, 1997, if the vessel is 36 years old or older and has a single hull, or is 41 years old or older and has a double bottom or double sides;

“(iv) after January 1, 1998, if the vessel is 34 years old or older and has a single hull, or is 39 years old or older and has a double bottom or double sides;

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“(v) after January 1, 1999, if the vessel is 32 years old or older and has a single hull, or 37 years old or older and has a double bottom or double sides;

“(vi) after January 1, 2000, if the vessel is 30 years old or older and has a single hull, or is 35 years old or older and has a double bottom or double sides;

“(vii) after January 1, 2001, if the vessel is 29 years old or older and has a single hull, or is 34 years old or older and has a double bottom or double sides;

“(viii) after January 1, 2002, if the vessel is 28 years old or older and has a single hull, or is 33 years old or older and has a double bottom or double sides;

“(ix) after January 1, 2003, if the vessel is 27 years old or older and has a single hull, or is 32 years old or older and has a double bottom or double sides;

“(x) after January 1, 2004, if the vessel is 26 years old or older and has a single hull, or is 31 years old or older and has a double bottom or double sides; and

“(xi) after January 1, 2005, if the vessel is 25 years old or older and has a

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single hull, or is 30 years old or older and has a double bottom or double sides; and

“(C) in the case of a vessel of at least 30,000 gross tons —

“(i) after January 1, 1995, if the vessel is 28 years old or older and has a single hull, or 33 years old or older and has a double bottom or double sides;

“(ii) after January 1, 1996, if the vessel is 27 years old or older and has a single hull, or is 32 years old or older and has a double bottom or double sides;

“(iii) after January 1, 1997, if the vessel is 26 years old or older and has a single hull, or is 31 years old or older and has a double bottom or double sides;

“(iv) after January 1, 1998, if the vessel is 25 years old or older and has a single hull, or is 30 years old or older and has a double bottom or double sides;

“(v) after January 1, 1999, if the vessel is 24 years old or older and has a single hull, or 29 years old or older and has a double bottom or double sides; and

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“(vi) after January 1, 2000, if the vessel is 23 years old or older and has a single hull, or is 28 years old or older and has a double bottom or double sides.

“(4) Except as provided in subsection (b) of this section —

“(A) a vessel that has a single hull may not operate after January 1, 2010; and

“(B) a vessel that has a double bottom or double sides may not operate after January 1, 2015.”.

(b) **RULEMAKING.** — The Secretary shall, within 12 months after the date of the enactment of this Act, complete a rulemaking proceeding and issue a final rule to require that tank vessels over 5,000 gross tons affected by section 3703a of title 46, United States Code, as added by this section, comply until January 1, 2015, with structural and operational requirements that the Secretary determines will provide as substantial protection to the environment as is economically and technologically feasible.

(c) **CLERICAL AMENDMENT.** — The analysis for chapter 37 of title 46, United States Code, is amended by inserting after the item relating to section 3703 the following:

“3703a. Tank vessel construction standards.”.

(d) **LIGHTERING REQUIREMENTS.** — Section 3715(a) of title 46, United States Code, is amended —

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(1) in paragraph (1), by striking “; and” and inserting a semicolon;

(2) in paragraph (2), by striking the period and inserting “; and”; and

(3) by adding at the end the following:

“(3) the delivering and the receiving vessel had on board at the time of transfer, a certificate of financial responsibility as would have been required under section 1016 of the Oil Pollution Act of 1990, had the transfer taken place in a place subject to the jurisdiction of the United States;

“(4) the delivering and the receiving vessel had on board at the time of transfer, evidence that each vessel is operating in compliance with section 311(j) of the Federal Water Pollution Control Act (33 U.S.C. 1321(j)); and

“(5) the delivering and the receiving vessel are operating in compliance with section 3703a of this title.”.

(e) SECRETARIAL STUDIES. —

(1) OTHER REQUIREMENTS. — Not later than 6 months after the date of enactment of this Act, the Secretary shall determine, based on recommendations from the National Academy of Sciences or other qualified organizations, whether

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other structural and operational tank vessel requirements will provide protection to the marine environment equal to or greater than that provided by double hulls, and shall report to the Congress that determination and recommendations for legislative action.

(2) REVIEW AND ASSESSMENT. — The Secretary shall —

(A) periodically review recommendations from the National Academy of Sciences and other qualified organizations on methods for further increasing the environmental and operational safety of tank vessels;

(B) not later than 5 years after the date of enactment of this Act, assess the impact of this section on the safety of the marine environment and the economic viability and operational makeup of the maritime oil transportation industry; and

(C) report the results of the review and assessment to the Congress with recommendations for legislative or other action.

(f) VESSEL FINANCING. — Section 1104 of the Merchant Marine Act of 1936 (46 App. U.S.C. 1274) is amended —

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(1) by striking "SEC. 1104." and inserting "SEC. 1104A."; and

(2) by inserting after section 1104A (as redesignated by paragraph (1)) the following:

"SEC. 1104B. (a) Notwithstanding the provisions of this title, except as provided in subsection (d) of this section, the Secretary, upon the terms the Secretary may prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in financing and refinancing, including reimbursement to an obligor for expenditures previously made, of a contract for construction or reconstruction of a vessel or vessels owned by citizens of the United States which are designed and to be employed for commercial use in the coastwise or intercoastal trade or in foreign trade as defined in section 905 of this Act if —

"(1) the construction or reconstruction by an applicant is made necessary to replace vessels the continued operation of which is denied by virtue of the imposition of a statutorily mandated change in standards for the operation of vessels, and where, as a matter of law, the applicant would otherwise be denied the right to continue operating vessels in the trades in which the applicant operated prior to the taking effect of the statutory or regulatory change;

"(2) the applicant is presently engaged in transporting cargoes in vessels of the type and

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class that will be constructed or reconstructed under this section, and agrees to employ vessels constructed or reconstructed under this section as replacements only for vessels made obsolete by changes in operating standards imposed by statute;

“(3) the capacity of the vessels to be constructed or reconstructed under this title will not increase the cargo carrying capacity of the vessels being replaced;

“(4) the Secretary has not made a determination that the market demand for the vessel over its useful life will diminish so as to make the granting of the guarantee fiducially imprudent; and

“(5) the Secretary has considered the provisions of section 1104A(d)(1)(A) (iii), (iv), and (v) of this title.

“(b) For the purposes of this section —

“(1) the maximum term for obligations guaranteed under this program may not exceed 25 years;

“(2) obligations guaranteed may not exceed 75 percent of the actual cost or depreciated actual cost to the applicant for the construction or reconstruction of the vessel; and

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“(3) reconstruction cost obligations may not be guaranteed unless the vessel after reconstruction will have a useful life of at least 15 years.

“(c)(1) The Secretary shall by rule require that the applicant provide adequate security against default. The Secretary may, in addition to any fees assessed under section 1104A(e), establish a Vessel Replacement Guarantee Fund into which shall be paid by obligors under this section —

“(A) annual fees which may be an additional amount on the loan guarantee fee in section 1104A(e) not to exceed an additional 1 percent; or

“(B) fees based on the amount of the obligation versus the percentage of the obligor’s fleet being replaced by vessels constructed or reconstructed under this section.

“(2) The Vessel Replacement Guarantee Fund shall be a subaccount in the Federal Ship Financing Fund, and shall —

“(A) be the depository for all moneys received by the Secretary under sections 1101 through 1107 of this title with respect to guarantee or commitments to guarantee made under this section;

“(B) not include investigation fees payable under section 1104A(f) which shall be paid to the Federal Ship Financing Fund; and

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“(C) be the depository, whenever there shall be outstanding any notes or obligations issued by the Secretary under section 1105(d) with respect to the Vessel Replacement Guarantee Fund, for all moneys received by the Secretary under sections 1101 through 1107 from applicants under this section.

“(d) The program created by this section shall, in addition to the requirements of this section, be subject to the provisions of sections 1101 through 1103; 1104A(b) (1), (4), (5), (6); 1104A(e); 1104A(f); 1104A(h); and 1105 through 1107; except that the Federal Ship Financing Fund is not liable for any guarantees or commitments to guarantee issued under this section.”.

SEC. 4116. PILOTAGE.

(a) **PILOT REQUIRED.** — Section 8502(g) of title 46, United States Code, is amended to read as follows:

“(g)(1) The Secretary shall designate by regulation the areas of the approaches to and waters of Prince William Sound, Alaska, if any, on which a vessel subject to this section is not required to be under the direction and control of a pilot licensed under section 7101 of this title.

“(2) In any area of Prince William Sound, Alaska, where a vessel subject to this section is required to be under the direction and control of a pilot licensed under section 7101 of this title, the pilot may not be a member of the crew of that vessel and shall be a pilot licensed by the State of Alaska

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who is operating under a Federal license, when the vessel is navigating waters between 60°49' North latitude and the Port of Valdez, Alaska.”.

(b) **SECOND PERSON REQUIRED.** — Section 8502 of title 46, United States Code, is amended by adding at the end the following:

“(h) The Secretary shall designate waters on which tankers over 1,600 gross tons subject to this section shall have on the bridge a master or mate licensed to direct and control the vessel under section 7101(c)(1) of this title who is separate and distinct from the pilot required under subsection (a) of this section.”.

(c) **ESCORTS FOR CERTAIN TANKERS.** — Not later than 6 months after the date of the enactment of this Act, the Secretary shall initiate issuance of regulations under section 3703(a)(3) of title 46, United States Code, to define those areas, including Prince William Sound, Alaska, and Rosario Strait and Puget Sound, Washington (including those portions of the Strait of Juan de Fuca east of Port Angeles, Haro Strait, and the Strait of Georgia subject to United States jurisdiction), on which single hulled tankers over 5,000 gross tons transporting oil in bulk shall be escorted by at least two towing vessels (as defined under section 2101 of title 46, United States Code) or other vessels considered appropriate by the Secretary.

(d) **TANKER DEFINED.** — In this section the term “tanker” has the same meaning the term has in section 2101 of title 46, United States Code.

*Appendix F***SEC. 4117. MARITIME POLLUTION PREVENTION
TRAINING PROGRAM STUDY.**

The Secretary shall conduct a study to determine the feasibility of a Maritime Oil Pollution Prevention Training program to be carried out in cooperation with approved maritime training institutions. The study shall assess the costs and benefits of transferring suitable vessels to selected maritime training institutions, equipping the vessels for oil spill response, and training students in oil pollution response skills. The study shall be completed and transmitted to the Congress no later than one year after the date of the enactment of this Act.

**SEC. 4118. VESSEL COMMUNICATION EQUIPMENT
REGULATIONS.**

The Secretary shall, not later than one year after the date of the enactment of this Act, issue regulations necessary to ensure that vessels subject to the Vessel Bridge-to-Bridge Radiotelephone Act of 1971 (33 U.S.C. 1203) are also equipped as necessary to —

(1) receive radio marine navigation safety warnings; and

(2) engage in radio communications on designated frequencies with the Coast Guard, and such other vessels and stations as may be specified by the Secretary.

* * *

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**SEC. 4202. NATIONAL PLANNING AND RESPONSE
SYSTEM.**

* * *

(c) **STATE LAW NOT PREEMPTED.** — Section 311(o)(2) of the Federal Water Pollution Control Act (33 U.S.C. 1321(o)(2)) is amended by inserting before the period the following: “, or with respect to any removal activities related to such discharge”.

* * *

**TITLE V — PRINCE WILLIAM SOUND
PROVISIONS**

* * *

**SEC. 5002. TERMINAL AND TANKER OVERSIGHT
AND MONITORING.**

* * *

(n) **SAVINGS CLAUSE.** —

(1) **REGULATORY AUTHORITY.** — Nothing in this section shall be construed as modifying, repealing, superseding, or preempting any municipal, State or Federal law or regulation, or in any way affecting litigation arising from oil spills or the rights and responsibilities of the United States or the State of Alaska, or municipalities thereof, to

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preserve and protect the environment through regulation of land, air, and water uses, of safety, and of related development. The monitoring provided for by this section shall be designed to help assure compliance with applicable laws and regulations and shall only extend to activities —

(A) that would affect or have the potential to affect the vicinity of the terminal facilities and the area of crude oil tanker operations included in the Programs; and

(B) are subject to the United States or State of Alaska, or municipality thereof, law, regulation, or other legal requirement.

* * *

TITLE VI — MISCELLANEOUS**SEC. 6001. SAVINGS PROVISIONS.**

* * *

(e) **ADMIRALTY AND MARITIME LAW.** — Except as otherwise provided in this Act, this Act does not affect —

(1) admiralty and maritime law; or

(2) the jurisdiction of the district courts of the United States with respect to civil actions under

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admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * *

"CIVIL PENALTIES

"SEC. 207. (a) PENALTY.

* * *

"(e) STATE LAW. — (1) Nothing in this section shall be construed or interpreted as preempting any State or political subdivision thereof from imposing any additional liability or requirements with respect to the discharge, or threat of discharge, of oil or other pollution by oil.

"(2) Nothing in this section shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to discharges of oil."

* * * *

APPENDIX G — LEGISLATIVE HISTORY

OIL POLLUTION ACT OF 1990

P.L. 101-380, see page 104 Stat. 484

DATES OF CONSIDERATION AND PASSAGE

House: November 9, 1989; August 3, 1990

Senate: August 4, November 19, 1989; August 2, 1990

* * *

House Conference Report No. 101-653, Aug. 1, 1990
[To accompany H.R. 1465]

* * *

OIL POLLUTION ACT

P.L. 101-380

HOUSE CONFERENCE REPORT NO. 101-653

* * *

SEC. 1018. RELATIONSHIP TO OTHER LAW

Section 106 of the Senate amendment and section 1018 of the House bill are generally similar provisions preserving the authority of any State to impose its own requirements or standards with respect to discharges of oil within that State. Both provisions preserve the authority of any State to establish or maintain funds for cleanup or compensation purposes and to collect any fees or penalties imposed under

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State law. Both provisions also authorize States to enforce the financial responsibility requirements of this Act on their own navigable waters.

The Conference substitute blends the provisions of the House and Senate bills, and adds a new subsection (d) pertaining to the liability of Federal employees.

Thus, subsection (a) of section 1018 of the substitute states explicitly that nothing in the substitute, or the Act of March 3, 1851 (the Limitation of Liability Act), shall affect in any way the authority of a State or local government to impose additional liability or other requirements with respect to oil pollution or to the discharge of oil within that State or with respect to any removal activities in connection with such a discharge. The subsection also makes it clear that nothing in this substitute or in the Limitation of Liability Act shall affect in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State or common law.

Subsection (b) states that nothing in the substitute or in section 9509 of the Internal Revenue Code (the provision establishing the Fund) shall affect in any way the authority of a State to establish or maintain a fund, or to require a person to contribute to a fund, the purpose of which is, in whole or in part, to pay for costs or damages resulting from an incident.

Similarly, subsection (c) clarifies that nothing in the substitute, the Limitation of Liability Act, or in section 9509 of the Internal Revenue Code shall affect in any way the authority of the United States or any State or local government

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to impose additional liability or requirements, or to determine the amount of, any civil or criminal penalty for any violation of law.

Finally, the substitute adds a new subsection clarifying that, for the purposes of section 2679(b)(2)(B) of title 28 of the U.S. Code, nothing in this substitute shall authorize or create a cause of action against a Federal officer or employee in that person's individual capacity for any act or omission while the person is acting within the scope of the person's office or employment.

The Conference substitute does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*, 435 U.S. 151²(1978).

* * * *

2. 98 S.Ct. 988, 55 L.Ed.2d 179.

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COAST GUARD AUTHORIZATION ACT OF 1996

P.L. 104-324, see page 110 Stat. 3901

DATES OF CONSIDERATION AND PASSAGE

Senate: November 17, 1995; September 28, 1996

House: May 9, 1995; February 29, September 27, 1996

* * *

House Conference Report No. 104-854, Sept. 27, 1986
[To accompany S. 1004]

* * *

Coast Guard Authorization Act of 1996
P.L. 104-324

HOUSE CONFERENCE REPORT NO. 104-854

* * *

**SECTION 1122. SMALL PASSENGER VESSEL
PILOT INSPECTION PROGRAM WITH
THE STATE OF MINNESOTA**

Section 1122 of the Senate bill allows the Secretary of Transportation to enter into an agreement with the State of Minnesota under which the state may inspect small passenger vessels operating in the waters of Minnesota under certain conditions.

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The House amendment has no comparable provision.

The Conference substitute adopts the Senate provision. As a matter of Constitutional law, the Federal Government has responsibility for requirements pertaining to vessel structure, design, equipment, and operation. (See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) and *Kelly v. Washington*, 302 U.S. 1 (1937)). Authority to make such regulations are vested in the Secretary of Transportation under sections 3306 and 3307 of title 46, United States Code. Federal uniformity in these matters is critical to maintain interstate and international commerce, and because the absence of uniformity hinders the United States' ability to seek increased international vessel standards to better protect the environment.

However, the Coast Guard is allowed to delegate its' authority to non-Federal entities and has delegated its' authority to inspect vessels to private classification societies such as the American Bureau of Shipping. This section establishes a new type of delegation — to a State. However, the State must enter into an agreement that will ensure that the State will apply the Federal standards to the inspection of these vessels. This will guarantee that there will continue to be uniformity in the application of the law to all vessels subject to Federal jurisdiction in Minnesota.

* * * *

**APPENDIX H — UNITED STATES COAST GUARD
REGULATIONS**

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR 135, 136, and 137

[CGD 91-035]

RIN 2115-AD90

Claims Under the Oil Pollution Act of 1990

57 Fed. Reg. 36,314

August 12, 1992

AGENCY: Coast Guard, DOT.

ACTION: Interim rule with request for comments.

* * *

Preemption

* * *

This rule does not preempt the authority of any State or political subdivision thereof from implementing their own compensation and liability regimes.

* * * *

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 164

46 CFR Part 35

[CGD 91-203, 91-204, 91-222]

RIN 2115-AE00, AE03, AE12

Navigation Underway; Tankers

58 Fed. Reg. 27,628

May 10, 1993

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

* * *

Federalism

* * *

The Coast Guard received a number of comments on its preemption determination, some in support and some in opposition. While a tanker covered by this rule is operating on the navigable waters of the U.S., the rule: (1) Prohibits the operation with unattended machinery spaces; (2) requires

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that a qualified individual be at the helm; and (3) requires two officers to be on the bridge. It is a well-settled principle that regulations concerning manning of commercial vessels in U.S. waters are the exclusive domain of the U.S. Coast Guard. Further, standardizing vessel manning requirements is necessary because vessels move from port to port in the national marketplace, and variation of manning requirements would be unreasonably burdensome. Therefore, the Coast Guard intends the manning provisions to preempt State action addressing the same subject matter. This rule does not alter the State-Federal relationship regarding pilotage requirements and does not preempt the States' authority to establish a requirement for a State pilot under 46 U.S.C. 8501.

* * * *

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 164

[CGD 91-222]

RIN 2115-AE03

Second Officer on the Bridge

57 Fed. Reg. 45,664

October 2, 1992

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

* * *

Federalism

* * *

. . . This proposed rule would require a second licensed officer on the bridge of all seagoing tankers of 1,600 gross tons or more transiting the internal waters of the United States, irrespective of the vessel's flag status. Generally, for foreign flag vessels and United States vessels sailing on registry in U.S. internal waters, States set pilotage requirements, and the Federal government may act only when the State has not

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exercised its authority. Once a State establishes a pilotage requirement for foreign flag and U.S. vessels sailing on registry, any Federal pilotage requirement is terminated. This proposed rule does not alter the State Federal relationship regarding pilotage requirements, and does not preempt the States authority to establish a requirement for a State pilot under 46 U.S.C. 8501.

For manning requirements other than pilotage, it is a well-settled principle that regulations concerning manning of U.S. commercial vessels are an exclusive domain of the Coast Guard. Further, standardizing vessel manning requirements is necessary because vessels move from port to port in the national marketplace, and variation of manning requirements would unreasonably burden vessel owners and operators. Therefore, if this rule becomes final, the Coast Guard intends it to preempt State action addressing the same subject matter.

* * * *

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 164

46 CFR Part 35

CGD 91-203

RIN 2115-AE12

Unattended Machinery Spaces: Operating Requirements

57 Fed. Reg. 12,378

April 9, 1992

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

* * *

Federalism

* * *

... This proposed rulemaking defines conditions under which a tank vessel may operate in the navigable waters of the United States with unattended machinery spaces. It is a well settled principle that regulations concerning manning of commercial vessels in U.S. waters are an exclusive domain

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of the Coast Guard. Further, standardizing vessel manning requirements is necessary because vessels move from port to port in the national marketplace, and variation of manning requirements would be unreasonably burdensome. Therefore, if this rule becomes final the Coast Guard intends it to preempt State action addressing the same subject matter.

* * * *

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Parts 150 and 154

[CGD 91-036]

RIN 2115-AD82

**Response Plans for Marine Transportation-Related
Facilities**

58 Fed. Reg. 7330

February 5, 1993

AGENCY: Coast Guard, DOT.

ACTION: Interim final rule.

* * *

Federalism

* * *

During the discussions of the Negotiated Rulemaking Committee, several States expressed concern about the issue of preemption. Some States, including Alaska, Washington, and Florida, have already issued regulations requiring oil spill response plans for facilities. The Coast Guard has evaluated the federalism issue in light of the statutory requirement for

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facility response plans and the accompanying provision which dictates that State law shall not be preempted. These regulations establish minimum requirements which may be supplemented by the States. However, a State may not adopt regulations inconsistent with Federal regulations. State law will be preempted by these regulations only to the extent that compliance with the State law will preclude owners or operators of facilities from complying with these requirements.

Section 311(o)(2) of the FWPCA explicitly preserves the authority of any State to impose its own requirements or standards with respect to the liability of persons involved in the removal of oil. Further, section 311(o)(3) of the FWPCA indicates that nothing in section 311 shall affect any State or local law not in conflict with anything therein.

The Supreme Court has held that a State may not issue a regulation which actually conflicts with a Federal statute or regulation. A conflict will be found "where compliance with Federal and State regulations is a physical impossibility." *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132.

Impossibility of compliance must be distinguished from inconsistency in Federal and State laws. For example, if a Federal regulation indicates several ways in which a requirement may be satisfied, a State may limit the methods available, but not preclude compliance by its regulations.

Executive Order 12612 and sections 311(o)(2) and (3) of the FWPCA emphasize the goal of preserving the authority of the States in pollution prevention and response. In *Askew*

Appendix H

v. American Waterways Operators, Inc., 93 S.Ct. 1590 (1973), the Supreme Court stated that "sea-to-shore pollution [is] historically within the reach of the police power of the States." (Id at 1601.) Hence, the Court has clearly preserved the authority of the States to regulate in this area, as long as State law is not in direct conflict with Federal law.

Section 311(j)(5) of the FWPCA specifically directs the President to issue these regulations. It is certified that the policies contained herein have been assessed in light of the principles of the Federalism Executive Order. Because this rule is being issued in response to a statutory mandate, the Coast Guard has determined that this action accords fully with the Executive Order.

* * *

Federalism

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Four comments expressed concern that State planning requirements may overlap, be inconsistent with, or be more stringent than Federal requirements; and encouraged the Coast Guard either to evaluate Federal and State regulations periodically for consistency so that there would not be "conflicting" requirements, or prepare a Federalism Assessment to address issues arising from concurrent State and Federal jurisdiction. The Federalism Executive Order and the FWPCA emphasize the President's and Congress's intent to preserve State authority to address matters of pollution prevention and response. Executive Order 12612 directs a

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Federal Executive branch agency (which includes the Coast Guard) to encourage states to develop their own policies to achieve program objectives. Consequently, a Federalism Assessment would be necessary only if the vessel response plan rules unduly impinged on a State's authority to establish its own regulatory structure, or imposed undue costs on a State.

The FWPCA provides convincing evidence of Congress's intent that, within three miles of shore, the protection of the marine environment should be a collaborative Federal and State effort. *Chevron et al v. Hammond, Governor of the State of Alaska et al*, 726 F2d 483, cert. den., 471 U.S. 1140, 105 S.Ct. 2686 (9th Cir. 1984). For example, section 402 of the statute (33 U.S.C. 1342) establishes the National Pollutant Discharge Elimination System, a regulatory program for regulating the discharge of pollutants into U.S. navigable waters. Minimum Federal standards apply to the discharge of certain pollutants, but the States have authority to establish and administer their own permit systems and to set standards stricter than the Federal ones. 33 U.S.C. sections 1342(b), 1370. Further, in the Declaration of Goals and Policy contained in section 101 of the FWPCA (33 U.S.C. 1251), Congress states that it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution of land and water resources.

United States courts have long recognized the rights of States to make both U.S.-flag and foreign-flag vessels conform to "reasonable, nondiscriminatory conservation and environmental protection measures * * * imposed by a State."

Appendix H

Ray v. Atlantic Richfield, 435 U.S. 151, at 164, 98 S.Ct. 988, at 997 (1973) [1978] (citations omitted). Also, section 311(o)(3) of the FWPCA contains express nonpreemption language. Therefore, a State standard setting more stringent planning requirements for tank vessel owners and operators in the regulating State's waters is encouraged under the FWPCA and is valid as long as the State requirement does not preclude compliance with the Federal requirements. Similarly, if a State chose to establish performance requirements for response to an oil spill, the Federal vessel response plan rules would not preclude that option. The Federal vessel response plan rules preempt State rules only to the extent that State rules may make it impossible to comply with Federal requirements. *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 83 S.Ct. 1210 (1963).

Two comments asked us to make it clear that the Federal On Scene Coordinator has ultimate authority to direct a Federally-managed spill response. Because we do not address performance criteria in the event of an actual response, this issue is beyond the scope of the vessel response plan rulemaking. The subject is better raised in the context of the Coast Guard and Environmental Protection Agency efforts to revise the National Contingency Plan.

One comment expressed concern that although the Coast Guard intends the vessel response plan rules to set out planning standards, a State may make the standard a performance standard. The comment cites § 88.46.070 Revised Code of Washington (West 1992) as an example of a State statute that allows the State to compel specific performance from an owner or operator under the Federal

Appendix H

plan. The Washington State law says that any State-approved prevention or contingency plan is legally binding on the persons submitting it, and may be enforced in the State courts. The interpretation of Washington State laws and regulations is a matter for judicial resolution and is outside the scope of these regulations.

One comment noted that its existing response plans cost approximately \$3,400 per vessel, that the State of Virginia charged \$3,353 for plan review, and that a State review should be unnecessary once a plan is approved at the Federal level. The Coast Guard has addressed the cost of the vessel response plan rules in its Regulatory Impact Analysis. We note, however, that Congress has encouraged a State-Federal partnership regarding oil pollution prevention and response, and that the Coast Guard has not proposed a user fee for review of Federal response plans.

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Appendix H

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 168

[CGD 91-202]

RIN 2115-AE10

Escort Vessels for Certain Tankers

59 Fed. Reg. 42,962

August 19, 1994

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is requiring escort vessels for certain oil tankers transiting Prince William Sound, Alaska, and Puget Sound, Washington. This rulemaking is mandated by the Oil Pollution Act of 1990 (OPA 90). The regulations will reduce the chances of a tanker running aground or colliding as a result of loss of propulsion or steering control, thereby potentially reducing the risk of an oil spill.

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*Appendix H***Federalism**

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The Coast Guard has analyzed this rule under the principles and criteria contained in Executive Order 12612 and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

This rule establishes standards and requirements for the escort of single hull tankers over 5,000 GT in Prince William Sound, Alaska and Puget Sound (and certain associated waters around Puget Sound), Washington. The authority to regulate such traffic is delegated to the Coast Guard by the Secretary of Transportation whose authority is committed by statute.

While these regulations establish minimal requirements for escort of certain tanker traffic through these designated areas, the Coast Guard does not intend to preempt the states from issuing more stringent requirements provided they are not in direct conflict with Federal law or this rulemaking.

* * * *

Appendix H

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Part 16

[CGD 95-090]

RIN 2115-AF25

**Programs for Chemical Drug and Alcohol Testing of
Commercial Vessel Personnel; Delay of Implementation
Dates**

60 Fed. Reg. 67,062

December 28, 1995

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

* * *

Federalism

* * *

. . . The authority to require programs for chemical drug and alcohol testing of commercial vessel personnel has been committed to the Coast Guard by Federal statutes. This final rule does, therefore, preempt State and local regulations regarding drug testing programs requiring the testing of persons onboard U.S. vessels in waters that are subject to the jurisdiction of a foreign government.

* * * *

Appendix H

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Parts 30, 31, 70, 71, 90, 91, and 107

[CGD 95-010]

RIN 2115-AF 11

**Alternate Compliance via Recognized Classification
Society and U.S. Supplement to Rules (CGD 95-010)**

60 Fed. Reg. 32,478

June 22, 1995

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

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Federalism

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... Furthermore, since these vessels tend to move from port to port in the national market place, these safety requirements need to be national in scope to avoid numerous, unreasonable and burdensome variances. Therefore, this action would preempt State action addressing the same matter.

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 164

46 CFR Parts 50, 52, 56, 58, 61, and 111

[CGD 83-043]

RIN 2115-AB41

**Incorporation of Amendments to the International
Convention for Safety of Life at Sea, 1974**

60 Fed. Reg. 24,767

May 10, 1995

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

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Federalism

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... The authority to issue regulations on the navigational safety of the vessels covered by this rule is committed to the Coast Guard by Federal statute. Therefore, the Coast Guard intends to preempt State or local laws on the navigational safety of these vessels.

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Appendix H

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Part 16

[CGD 91-019]

RIN 2115-AD84

**Chemical Drug and Alcohol Testing of Commercial Vessel
Personnel; Collection of Drug and Alcohol Testing
Information**

58 Fed. Reg. 68,274

December 23, 1993

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

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Federalism

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... The authority to require programs for chemical drug and alcohol testing of commercial vessel personnel has been committed to the Coast Guard by Federal statutes. This final rule does, therefore, preempt State and local regulations regarding drug testing programs requiring the testing of employees onboard U.S. vessels.

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 155

[CGD 90-068]

RIN 2115-AD66

Discharge Removal Equipment for Vessels Carrying Oil

58 Fed. Reg. 67,988

December 22, 1993

AGENCY: Coast Guard, DOT.

ACTION: Interim final rule.

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Federalism

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... This rule establishes regulations requiring certain vessels to carry discharge removal equipment. In *Ray v. Atlantic Richfield*, (435 U.S. 51, 98 S. Ct. 988, [1978]), the Supreme Court found that vessel design and equipment standards fall within the exclusive province of the Federal Government. The OPA 90 Conference Report explicitly says that provisions in section 1018 of OPA 90 preserving certain State authority are not meant to disturb this Supreme Court decision (House Conf. Rep., p. 122). Therefore, the Coast Guard intends this rule to preempt State action addressing the same subject matter.

* * * *

Appendix H

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Parts 4 and 16

[CGD 90-053]

RIN 2115-AD63

**Programs for Chemical Drug and Alcohol Testing of
Commercial Vessel Personnel; Exemption From Pre-
Employment and Periodic Testing**

58 Fed. Reg. 31,104

May 28, 1993

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

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Federalism

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... The authority to require programs for chemical drug and alcohol testing of commercial vessel personnel has been committed to the Coast Guard by Federal statutes. This final rule does, therefore, preempt State and local regulations regarding drug testing programs requiring the testing of employees onboard U.S. vessels.

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APPENDIX I — CONVENTIONS

**INTER-GOVERNMENTAL MARITIME
CONSULTATIVE ORGANIZATION**

**INTERNATIONAL CONFERENCE
ON
TRAINING AND
CERTIFICATION OF SEAFARERS, 1978**

Final Act of the Conference, with
attachments, including
the

**International Convention on
Standards of Training, Certification and
Watchkeeping for Seafarers, 1978**

Reprinted 1980

LONDON 1978

* * *

ARTICLE X

Control

(1) Ships, except those excluded by Article III, are subject, while in the ports of a Party, to control by officers duly authorized by that Party to verify that all seafarers serving on board who are required to be certificated by the Convention are so certificated or hold an appropriate dispensation. Such certificates shall be accepted unless there are clear grounds

Appendix I

for believing that a certificate has been fraudulently obtained or that the holder of a certificate is not the person to whom that certificate was originally issued.

(2) In the event that any deficiencies are found under paragraph (1) or under the procedures specified in Regulation I/4 – “Control Procedures”, the officer carrying out the control shall forthwith inform, in writing, the master of the ship and the Consul or, in his absence, the nearest diplomatic representative or the maritime authority of the State whose flag the ship is entitled to fly, so that appropriate action may be taken. Such notification shall specify the details of the deficiencies found and the grounds on which the Party determines that these deficiencies pose a danger to persons, property or the environment.

(3) In exercising the control under paragraph (1) if, taking into account the size and type of the ship and the length and nature of the voyage, the deficiencies referred to in paragraph (3) of Regulation I/4 are not corrected and it is determined that this fact poses a danger to persons, property or the environment, the Party carrying out the control shall take steps to ensure that the ship will not sail unless and until these requirements are met to the extent that the danger has been removed. The facts concerning the action taken shall be reported promptly to the Secretary-General.

(4) When exercising control under this Article, all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is so detained or delayed it shall be entitled to compensation for any loss or damage resulting therefrom.

Appendix I

(5) This Article shall be applied as may be necessary to ensure that no more favourable treatment is given to ships entitled to fly the flag of a non-Party than is given to ships entitled to fly the flag of a Party.

* * * *

Appendix I

SOLAS

Consolidated Edition, 1992

Consolidated text of
the International Convention for
the Safety of Life at Sea, 1974,
and its Protocol of 1978:
articles, annex and certificates

*Incorporating all amendments
up to and including the 1990 amendments
(1991 amendments included as an appendix)*

* * *

**International Maritime Organization
London, 1992**

* * *

Regulation 17

Acceptance of certificates

Certificates issued under the authority of a Contracting Government shall be accepted by the other Contracting Governments for all purposes covered by the present Convention. They shall be regarded by the other Contracting Governments as having the same force as certificates issued by them.

* * *

*Appendix I***Regulation 19*****Control****

(a) Every ship when in a port of another Party is subject to control by officers duly authorized by such Government in so far as this control is directed towards verifying that the certificates issued under regulation 12 or regulation 13 of this chapter are valid.

(b) Such certificates, if valid, shall be accepted unless there are clear grounds for believing that the condition of the ship or of its equipment does not correspond substantially with the particulars of any of the certificates or that the ship and its equipment are not in compliance with the provisions of regulation 11(a) and (b) of this chapter.

(c) In the circumstances given in paragraph (b) of this regulation or where a certificate has expired or ceased to be valid, the officer carrying out the control shall take steps to ensure that the ship shall not sail until it can proceed to sea or leave the port for the purpose of proceeding to the appropriate repair yard without danger to the ship or persons on board.

(d) In the event of this control giving rise to an intervention of any kind, the officer carrying out the control shall forthwith

* Refer to the following resolutions adopted by the Organization: A.466(XII): Procedures for the Control of Ships; A.597(15): Amendments to the Procedures for the Control of Ships; A.681(17): Procedures for the Control of Operational Requirements related to the Safety of Ships and Pollution Prevention; A.682(17): Regional co-operation in the control of ships and discharges.

Appendix I

inform, in writing, the Consul or, in his absence, the nearest diplomatic representative of the State whose flag the ship is entitled to fly of all the circumstances in which intervention was deemed necessary. In addition, nominated surveyors or recognized organizations responsible for the issue of the certificates shall also be notified. The facts concerning the intervention shall be reported to the Organization.

(e) The port State authority concerned shall notify all relevant information about the ship to the authorities of the next port of call, in addition to parties mentioned in paragraph (d) of this regulation, if it is unable to take action as specified in paragraphs (c) and (d) of this regulation or if the ship has been allowed to proceed to the next port of call.

(f) When exercising control under this regulation all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is thereby unduly detained or delayed it shall be entitled to compensation for any loss or damage suffered.

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**Protocol of 1978 relating to the International
Convention for the Prevention of
Pollution from Ships, 1973**

(MARPOL 73/78)

Article 5

Certificates and special rules on inspection of ships

- (1) Subject to the provisions of paragraph (2) of the present article a certificate issued under the authority of a Party to the Convention in accordance with the provisions of the regulations shall be accepted by the other Parties and regarded for all purposes covered by the present Convention as having the same validity as a certificate issued by them.
- (2) A ship required to hold a certificate in accordance with the provisions of the regulations is subject, while in the ports or offshore terminals under the jurisdiction of a Party, to inspection by officers duly authorized by that Party. Any such inspection shall be limited to verifying that there is on board a valid certificate, unless there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of that certificate. In that case, or if the ship does not carry a valid certificate, the Party carrying out the inspection shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment. That Party may, however, grant such a ship permission to leave the port or offshore terminal

Appendix I

for the purpose of proceeding to the nearest appropriate repair yard available.

- (3) If a Party denies a foreign ship entry to the ports or offshore terminals under its jurisdiction or takes any action against such a ship for the reason that the ship does not comply with the provisions of the present Convention, the Party shall immediately inform the consul or diplomatic representative of the Party whose flag the ship is entitled to fly, or if this is not possible, the Administration of the ship concerned. Before denying entry or taking such action the Party may request consultation with the Administration of the ship concerned. Information shall also be given to the Administration when a ship does not carry a valid certificate in accordance with the provisions of the regulations.
- (4) With respect to the ship of non-Parties to the Convention, Parties shall apply the requirements of the present Convention as may be necessary to ensure that no more favourable treatment is given to such ships.

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Appendix I

LAW OF THE SEA TREATY PROVISIONS

**PART II
TERRITORIAL SEA AND CONTIGUOUS ZONE**

* * *

**SECTION 3. INNOCENT PASSAGE
IN THE TERRITORIAL SEA**

SUBSECTION A. RULES APPLICABLE TO ALL SHIPS

* * *

Article 21

**Laws and regulations of the coastal State relating to
innocent passage**

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;

Appendix I

- (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

3. The coastal State shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

Article 22

**Sea lanes and traffic separation schemes
in the territorial sea**

1. The coastal State may, where necessary having regard to the safety of navigation, require foreign ships exercising the

Appendix I

right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.

2. In particular, tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes.

3. In the designation of sea lanes and the prescription of traffic separation schemes under this article, the coastal State shall take into account:

- (a) the recommendations of the competent international organization;
- (b) any channels customarily used for international navigation;
- (c) the special characteristics of particular ships and channels; and
- (d) the density of traffic.

4. The coastal State shall clearly indicate such sea lanes and traffic separation schemes on charts to which due publicity shall be given.

* * *

Appendix I

PART III

STRAITS USED FOR INTERNATIONAL NAVIGATION

* * *

SECTION 2. TRANSIT PASSAGE

Article 37

Scope of this section

This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

* * *

Article 44

Duties of States bordering straits

States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

SECTION 3. INNOCENT PASSAGE

Article 45

Innocent passage

1. The regime of innocent passage, in accordance with Part II, section 3 shall apply in straits used for international navigation:

Appendix I

- (a) excluded from the application of the regime of transit passage under article 38, paragraph 1; or
- (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.

2. There shall be no suspension of innocent passage through such straits.

* * *

PART VII

HIGH SEAS

* * *

Article 94

Duties of the flag State

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall:

- (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and

Appendix I

- (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:

- (a) the construction, equipment and seaworthiness of ships;
- (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
- (c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure:

- (a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;
- (b) that each ship is in the charge of a master and officers who possess appropriate

Appendix I

qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

- (c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or

Appendix I

installations of another State or to the marine environment. The flag State and the other State shall co-operate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

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Appendix 1

33 U.S.C. foll. § 1602

**INTERNATIONAL REGULATIONS FOR
PREVENTING COLLISIONS AT SEA, 1972**

* * *

Rule 5. Look-out

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

* * * *

**APPENDIX J — WASHINGTON ADMINISTRATIVE
CODE**

**Chapter 317-21 WAC
OIL SPILL PREVENTION PLANS**

**PART 1
GENERAL**

* * *

317-21-020 Application.

* * *

**PART 2
PLAN REQUIREMENTS**

- 317-21-100 Format.
- 317-21-110 Units of measure.
- 317-21-120 Submittal agreement.
- 317-21-130 Event reporting.
- 317-21-140 Vessel specifying information and documentation.

**PART 3
BEST ACHIEVABLE PROTECTION STANDARDS
FOR TANKERS**

- 317-21-200 Operating procedures — Watch practices.
- 317-21-205 Operating procedures — Navigation.
- 317-21-210 Operating procedures — Engineering.
- 317-21-215 Operating procedures — Prearrival tests and inspections.

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317-21-220	Operating procedures — Emergency procedures.
317-21-225	Operating procedures — Events.
317-21-230	Personnel policies — Training.
317-21-235	Personnel policies — Illicit drug and alcohol use.
317-21-240	Personnel policies — Personnel evaluation.
317-21-245	Personnel policies — Work hours.
317-21-250	Personnel policies — Language.
317-21-255	Personnel policies — Record keeping.
317-21-260	Management.
317-21-265	Technology.

* * *

PART 1
GENERAL

* * *

WAC 317-21-020 Application. (1) A tank vessel may not operate in state waters unless the vessel's owner or operator complies with the provisions of this chapter and any administrative action or order issued by the office in administering this chapter.

(2) A tank vessel entering state waters based on a U.S. Coast Guard determination that the vessel is in distress is exempt from the requirements of this chapter.

(3) An oil spill prevention plan for a tanker must meet the standards in Part 3 of this chapter.

Appendix J

(4) An oil spill prevention plan for a tank barge must meet the standards in Part 4 of this chapter.

(5) An oil spill prevention plan for a tank barge must demonstrate that any tow vessel used to transport the barge complies with applicable standards in Part 4 of this chapter.

(6) The provisions of an oil spill prevention plan approved by the office are legally binding on the tank vessel owner or operator for whom it was submitted and the owner's or operator's successors, assigns, agents, and employees.

[Statutory Authority: RCW 88.46.040. 96-03-070, § 317-21-020, filed 1/17/96, effective 2/17/96. Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-020, filed 12/9/94, effective 6/7/95.]

* * *

PART 2

PLAN REQUIREMENTS

WAC 317-21-100 Format. A tank vessel owner or operator shall submit an oil spill prevention plan divided into a system of numbered chapters, sections, and appendices, and bound and tabbed in loose-leaf binders. The chapters of the plan must be in the following order:

(1) *Preface.* The preface must include the submittal agreement required under WAC 317-21-120, a statement by the owner or operator that the vessel complies with the financial responsibility requirements of chapter 88.40 RCW,

Appendix J

and, if applicable, a letter addressed to the administrator identifying protected information under WAC 317-21-040.

(2) *Document control.* An amendment log or other form of document control must be provided to record amendments to the plan. The section amended, date of amendment, and name of the person making the amendment must be indicated.

(3) *Table of contents.* The table of contents must show the chapter, section, and appendix titles and page numbers, and the page numbers for tables, figures, and other graphics.

(4) *Chapter 1.* This chapter must contain policies, procedures, and practices for watch standing, navigation, engineering, pre-arrival tests and inspections, and emergencies that meet the standards in WAC 317-21-200 through 317-21-225 for tankers, or 317-21-300 through 317-21-310 for tank barges.

(5) *Chapter 2.* This chapter must contain policies, procedures, and practices for personnel training, illicit drug and alcohol use, personnel evaluation, work hour requirements, language and work hour documentation requirements that meet the standards in WAC 317-21-230 through 317-21-255 for tankers, or 317-21-315 through 317-21-335 for tank barges.

(6) *Chapter 3.* This chapter must contain policies, procedures, and practices that describe management, vessel visitation, and preventive maintenance programs that meet the standards in WAC 317-21-260 for tankers, or 317-21-340 for tank barges.

Appendix J

(7) *Chapter 4.* This chapter must contain descriptions of navigation equipment, emergency towing systems, towing equipment, emergency reconnection equipment, and navigation lights and day shapes that meet the standards in WAC 317-21-265 for tankers, or 317-21-345 for tank barges.

(8) *Chapter 5.* This chapter must contain an event summary and event reports required under WAC 317-21-130.

[Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-100, filed 12/9/94, effective 6/7/95.]

WAC 317-21-110 Units of measure. Owners or operators shall express units of measure as follows: volumetric measurements shall be in barrels (petroleum); linear measurements shall be in feet and decimal feet; weight measurements shall be in long tons; velocity shall be in knots; and propulsive power shall be in shaft horsepower.

[Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-110, filed 12/9/94, effective 6/7/95.]

WAC 317-21-120 Submittal agreement. An oil spill prevention plan must include a submittal agreement that includes the following information.

(1) Information identifying the person submitting the plan including:

(a) The owner or operator by name, principle place of business, mailing address, and telephone number;

Appendix J

(b) The name, call sign, and Lloyd's number (official number for tank barges) of vessels covered by the plan; and

(c) The name, address, and telephone number of a person designated by the owner or operator to be contacted for matters concerning the plan.

(2) A statement, signed by the owner or operator, verifying that the submitted plan describes policies, procedures, and practices of the owner or operator employed on vessels covered by the plan and commits the owner or operator, the owner's or operator's successors, assigns, agents, and employees to complying with the policies, procedures, and practices described in the plan.

(3) For a tanker, an operational summary that describes:

(a) Routes normally transited including usual ports of call;

(b) Frequency and duration of typical port calls in state waters;

(c) The owner's or operator's management organization and identification by name, mailing address, and phone number of any ship, technical, or crewing management company providing service for a vessel covered by the plan;

(d) The total vessel manning complement required for compliance with company policy, collective bargaining agreements, insurance and underwriters, or other agreement; and

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(e) The rating and assigned duties of any licensed or documented seamen who are brought aboard to temporarily relieve or supplement the vessel's manning complement, if any, while the vessel is in port.

(4) For a tank barge, an operational summary for the barge and a typical tow vessel that contains the information required under subsection (3) of this section.

(5) For a tanker or tank barge that operates entirely in state waters, a written schedule of the vessel's typical operations in state waters. The written schedule must identify the:

(a) Vessel's maximum bunker and cargo capacity in barrels (petroleum), average quantity of bunker and cargo carried, and usual place and schedule for oil transfer and bunkering operations;

(b) Typical routes served by the vessel;

(c) Typical schedule of the vessel;

(d) Expected pilotage, tug escort, lightering, or other assistance beyond that required by federal or state law; and

(e) Contingency plan covering the vessel under Washington law.

(6) A written schedule submitted under WAC 317-40-050(2) meets the requirement under subsection (5) of this section.

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[Statutory Authority: RCW 88.46.040. 96-03-070, § 317-21-120, filed 1/17/96, effective 2/17/96. Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-120, filed 12/9/94, effective 6/7/95.]

WAC 317-21-130 Event reporting. (1) The owner or operator shall include an event summary of the past five years for each vessel covered by an oil spill prevention plan, or during the time the vessel has been under the control of the owner or operator if less than five years. The summary must include:

- (a) The date, time, and location of each event;
- (b) The weather conditions at the time of the event;
- (c) The vessel operations underway at the time;
- (d) The identity of any facilities and other vessels involved in the event;
- (e) The type and amount of any oil spilled, and the estimated amount recovered;
- (f) A list of any government agencies to which the event was reported;
- (g) A brief analysis of any known causes and contributing factors for each event that considers, at a minimum, human error, equipment or technology failure, and maintenance or inspection deficiencies;

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(h) A description of measures taken to prevent a reoccurrence of each event, including changes to operating or maintenance procedures, personnel policies, vessel crew and organization, and the vessel's technology.

(2) The owner or operator shall submit to the office reports of events that occur after a plan is submitted. Each report must contain the information required by subsection (1) of this section. The owner or operator shall submit the report immediately on request by the office. If the office makes no request, the owner or operator shall submit a report no later than thirty days after the date of the event.

(3) For the purposes of this section, "event" means a:

(a) Collision;

(b) Allision;

(c) Near-miss incident which means a pilot, master, or other person in charge of navigating a tank vessel successfully takes action of a nonroutine nature to avoid a collision with another ship, structure, or aid to navigation, or grounding of the vessel, or damage to the environment;

(d) Marine casualty which means those casualties described in 46 C.F.R. sec. 4.05-1, except subsections (a)(5), (a)(6) and (b), regardless of vessel type, nation of registry, or location;

(e) Disabled vessel which means an accidental or intentional grounding, failure of the propulsion or primary

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steering systems, failure of a component or control system that reduces the vessel's maneuverability, or fire, flood, or other incident that affects the vessel's seaworthiness or fitness for service;

(f) Spills of oil from a tank vessel of over twenty-five barrels; or

(g) For a tank barge, damaged towing gear.

(4) Failure to submit a complete event summary or an event report may result in:

(a) Disapproval of the owner's or operator's plan;

(b) Penalties assessed under RCW 88.46.090(6) for each failure to submit information requested in subsection 1 (a) through (h) of this section; or

(c) Referral for prosecution under RCW 88.46.080.

[Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-130, filed 12/9/94, effective 6/7/95.]

WAC 317-21-140 Vessel specific information and documentation. The owner or operator shall include in an appendix to a vessel's oil spill prevention plan vessel specific information and documentation.

(1) Vessel specific information includes each vessel's:

(a) Name and former names, country of registry, official number, and call sign;

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(b) Oil carrying capacity for cargo and bunkers;

(c) Length overall, maximum beam, gross tonnage, deadweight tonnage, number of screws, shaft horsepower, and type of propulsion;

(d) A simple diagram of the vessel's general arrangement;

(e) For tank barges, the minimum shaft horsepower, number and type of screws, and number of persons required to crew vessels used to tow the barge; and

(f) The highest grade of oil each vessel is authorized to carry.

(2) Certification and classification documentation includes:

(a) Copies of certificates of inspection and other authorizing documents issued by the U. S. Coast Guard in effect at time of submission of the plan;

(b) Copies of minimum manning certificates and certification by foreign classification societies in effect at time of submission of the plan;

(c) Copies of certificates of financial responsibility issued either by the state of Washington, or issued by another government but which meet the financial responsibility requirements of chapter 88.40 RCW; and

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(d) For owners or operators of tank barges, copies of any certification or other authorizing documentation for tow vessels supplying propulsion to the tank barge.

[Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-140, filed 12/9/94, effective 6/7/95.]

* * *

PART 3
BEST ACHIEVABLE PROTECTION STANDARDS
FOR TANKERS

WAC 317-21-200 Operating procedures — Watch practices. An oil spill prevention plan for a tanker must describe watch practices, policies, and procedures that meet the following standards.

(1) *Navigation watch.* The navigation watch shall consist of at least two licensed deck officers, a helmsman, and a lookout. One of the licensed deck officers may be a state-licensed pilot when the tanker is in pilotage waters. The helmsman may not serve as a lookout.

(a) When the tanker is operating in restricted visibility, the navigation watch shall include at least three licensed deck officers, one of whom may be a state-licensed pilot when the tanker is in pilotage waters. The vessel master or officer in charge shall determine periods of restricted visibility and record in the deck log the time restricted visibility begins and ends.

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(b) Lookouts must be posted in a safe location that allows sight and hearing of all navigational hazards and other vessels.

(c) There must be rapid and reliable communication between the lookout and the officer in charge on the bridge.

(d) The name of a navigation watch member must be logged in the deck log when the member assumes watch-standing duties.

(2) *Bridge resource management.* The navigation watch shall employ a bridge resource management system that organizes the navigation watch into a bridge team and coordinates the use of bridge equipment for vessel navigation, collision avoidance, and bridge administration. The bridge resource management system must be standard practice throughout the owner's or operator's fleet. The system must include, but is not limited to:

(a) Defined bridge team assignments and duties for open sea transits, coastal and restricted waterway navigation, and conditions of restricted visibility;

(b) Procedures for navigating with a pilot;

(c) Defined responsibilities, stations, and communication guidelines for each bridge team member in response to emergencies, including pollution incidents;

(d) Clearly articulated goals, objectives, and priorities for each bridge team member;

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(e) Clear delegation of duties, responsibilities, and authority between bridge team members;

(f) Guidelines for understandable and situation-specific communication between bridge team members and between the bridge team and pilot for open sea transits, coastal, and restricted waterway navigation, and conditions of restricted visibility;

(g) Comprehensive passage and voyage planning; and

(h) Defined responsibilities, stations, and communication guidelines for each bridge team member for maneuvering to enter or leave designated and customary shipping lanes, anchorage, and moorage.

(3) *Coordination with pilots.* The bridge resource management system must include a procedure to coordinate interaction of the bridge team and pilot at a time and in a manner that does not interfere with the performance of the pilot's duties.

(a) The master shall identify for the pilot those members of the bridge team who are not proficient in English and explain the responsibilities of each licensed deck officer on watch.

(b) To facilitate this coordination, vessel masters shall use a checklist that includes, at a minimum, the following:

(i) Information requested by the pilot under WAC 296-116-205 concerning vessel maneuvering characteristics,

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condition of navigation and communication equipment, capabilities and problems with the propulsion and steering system, and other vessel specifications;

(ii) Navigational procedures and considerations, including destination, intended route, planned speed, vessel traffic services, and tug escort requirements; and

(iii) Local conditions including expected weather, tide, current, sea conditions, and vessel traffic.

(c) If conditions permit, the pilot coordination checklist may be covered during the preescort conference required under 33 CFR Part 168 for single-hull tankers over five thousand gross tons.

(4) *Security rounds.* The master shall designate spaces on the vessel subject to security rounds to identify and to correct, if feasible, safety hazards such as potential fire hazards, defective machinery, hull and bulkhead integrity, malfunctioning safety equipment, potential sources of pollution, and potentially dangerous crew activities.

(a) Security rounds must be conducted when the vessel is underway, anchored, or moored.

(b) The master shall designate security rounds on as much of the vessel as the master deems safe for the crew member making the round.

(c) Crew members making security rounds shall be provided appropriate training and checklists, and instructed

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to first notify the deck watch officer before attempting corrective action.

(d) Security rounds must be made at least every two hours. On tankers equipped with functioning automated fire and flooding detection systems, security rounds must be made at least every four hours.

(e) The vessel's deck watch officer shall log the completion of each security round in the deck log.

(5) *Anchor watch.* A licensed deck officer shall maintain a watch from the bridge while the tanker is anchored. The officer shall continuously monitor the position of the vessel at anchor and plot its position at least once each hour.

(6) *Engineering watch.* Licensed engineers shall be in the engineering control room and in the immediate vicinity of the machinery space's emergency throttle controls if:

(a) The tanker's engineering control room is not within the machinery spaces; and

(b) The vessel is maneuvering to embark or disembark a pilot, docking or departing berth, or anchoring or departing anchorage.

[Statutory Authority: RCW 88.46.040. 96-03-070, § 317-21-200, filed 1/17/96, effective 2/17/96. Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-200, filed 12/9/94, effective 6/7/95.]

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WAC 317-21-205 Operating procedures — Navigation. An oil spill prevention plan for a tanker must describe navigation practices, policies and procedures that meet the following standards.

(1) *Fix intervals.* The position of tankers while underway in state waters must be constantly monitored using all appropriate navigational aids to determine set and drift. Positions must be recorded at fifteen minute intervals or less, and may be recorded manually or electronically.

(2) *Voyage planning.* Prior to operating in state waters, the vessel master shall ensure that a comprehensive written voyage plan is developed for the tanker's trip through state waters. The voyage plan is a navigation guide used by the bridge team for transits through state waters. The plan should not be adhered to without deviation. The advice of the vessel's state-licensed pilot and varying local conditions must be taken into consideration. A standard voyage plan for consecutive voyages along the same routes may be used if updated prior to the tanker's entry into state waters. The voyage plan must address, at a minimum, the following:

(a) A review of available charts and navigational publications to determine waterway characteristics such as channel depth and width, turning areas, navigational obstructions, and appropriate speeds for each waterway transited;

(b) A review of notices to mariners and other navigational publications to determine the accuracy and dependability, and operating status, of available navigational aids, including radio-navigational aids;

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(c) A review of available charts, navigational publications, and geographic oil spill response plans to determine environmentally sensitive areas designated and provided by the northwest area committee established under 33 U.S.C. sec. 1321(j), traffic separation systems, areas-to-be-avoided, landfalls, routes expected to be transited at night, and other areas where caution should be exercised;

(d) Predicted weather, currents and tides;

(e) Expected vessel traffic;

(f) Procedures, expected communications, and times for complying with the requirements for vessel traffic services, pilotage, tug escorts, and tug assists;

(g) Emergency procedures to be used while transiting state waters for vessel casualties, pollution incidents, and personnel health and safety;

(h) Berthing and anchoring arrangements, including water depth at intended mooring or anchorage;

(i) Engineering considerations, including pre-arrival tests and inspections as required under WAC 317-21-215, planned maintenance, fuel tanks used and expected fuel consumption, stability, trim and drafts, and required ballast; and

(j) Review of the information in, and accuracy of, available charts, notices to mariners, and other navigational publications.

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(3) *Compass checks.* While underway in state waters, the vessel master shall establish a schedule for frequent comparisons of the steering gyrocompass with the magnetic compass;

(4) *Port Angeles.* A master of a tanker carrying cargo shall use at least one assist tug for anchoring and departing anchorages in the port of Port Angeles. The port of Port Angeles includes all navigable waters west of 123 degrees, 24 minutes west longitude encompassed by Ediz Hook.

(5) *Tug escorts.* Reserved.

(6) *Rescue tug.* Reserved.

[Statutory Authority: RCW 88.46.040. 96-03-070, § 317-21-205, filed 1/17/96, effective 2/17/96. Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-205, filed 12/9/94, effective 6/7/95.]

WAC 317-21-210 Operating procedures — Engineering. An oil spill prevention plan for a tanker must describe engineering practices, policies, and procedures that meet the following standards.

(1) Tankers without automatic stand-by switching gear for stand-by generators must operate with a stand-by generator running and immediately available to assume the electrical load while underway in state waters.

(2) The steering gear flat must be inspected hourly while operating in state waters, unless monitored by closed circuit television or other acceptable monitoring system.

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(3) If applicable, scoop injection cooling water systems must be secured at least six hours before operating in state waters.

(4) If applicable, the main engines must be operating to capacity on fuel used for maneuvering before operating in state waters.

[Statutory Authority: RCW 88.46.040. 96-03-070, § 317-21-210, filed 1/17/96, effective 2/17/96. Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-210, filed 12/9/94, effective 6/7/95.]

WAC 317-21-215 Operating procedures — Prearrival tests and inspections. An oil spill prevention plan for a tanker must describe policies, procedures, and practices that require the following prearrival tests or inspections, as appropriate for the system, to be conducted and logged in the deck or engineering log twelve hours or less before entering or getting underway in state waters.

(1) Navigation equipment, including compasses, radars, direction finders, and speed monitoring devices, must be inspected. Compass, range, and bearing errors must be logged in the deck log and posted on the bridge to be used by the bridge team.

(2) Emergency and stand-by ship service generators must be started and the switch gear proven to be working.

(3) All steering systems and local controls of the steering gear at the steering gear flat must be inspected or tested, and

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the steering gear flat inspected for unusual conditions such as leaks, fractures, and loose connections.

(4) The main engine, or engines, must be tested ahead and astern, or through the full range of pitch of controllable pitch propellers, if the tanker is so equipped.

(5) Main lubrication oil pumps must be inspected or tested and ready for immediate use.

(6) Main heavy oil pumps must be inspected or tested and ready for immediate use.

(7) For main engine lubrication and fuel oil systems with fitted duplex strainers, stand-by strainers must be cleaned, purged, and made immediately available.

(8) Fuel sufficient to operate the main engine or engines on the transit to berth or anchorage must be transferred to the main engine settler or service tanks, or both.

(9) For motor-driven tankers:

(a) Main and stand-by cooling water system circulating pumps must be inspected or tested and ready for immediate use;

(b) Intake or charge air auxiliary electric blowers, if applicable, must be inspected or tested and ready for immediate use;

(c) Starting and control air tanks must be filled and ready for use;

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(d) Main and stand-by air compressors must be inspected or tested and ready for immediate use; and

(e) The starting air piping system must be aligned and drained of condensate.

(10) For steam-driven tankers:

(a) Spare boiler burners must be prepared and ready for immediate use;

(b) Forced draft fans must be inspected or tested and ready for immediate use; and

(c) Main and stand-by feed water pumps must be inspected or tested and ready for immediate use.

[Statutory Authority: RCW 88.46.040. 96-03-070, § 317-21-215, filed 1/17/96, effective 2/17/96. Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-215, filed 12/9/94, effective 6/7/95.]

WAC 317-21-220 Operating procedures — Emergency procedures. An oil spill prevention plan for a tanker must describe practices, policies, and procedures for emergencies that meet the following standards.

(1) The vessel master shall maintain and post station bills clearly stating crew assignments and duties for the following emergencies:

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- (a) Shipboard fire;
- (b) Orders to abandon ship;
- (c) Man overboard; and
- (d) Oil spill response.

(2) The vessel master shall establish written procedures for responding to:

- (a) Collisions and allisions;
- (b) Groundings and strandings;
- (c) Hull breach, structural failure and foundering;
- (d) Loss of propulsion;
- (e) Loss of steering;
- (f) Loss of electrical power; and
- (g) Gyrocompass malfunction.

(3) The vessel master shall establish written procedures outlining preparations for:

- (a) Emergency towing;
- (b) Responding to loss of throttle control from the bridge which includes ensuring engineers are quickly on station as described in WAC 317-21-200(6); and

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(c) Weather that poses hazards to personnel, the vessel, or equipment.

[Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-220, filed 12/9/94, effective 6/7/95.]

WAC 317-21-225 Operating procedures — Events. If the vessel is involved in an event, defined under WAC 317-21-130(3), while in state waters, the position plotting records, whether written, typed, electronically, or otherwise recorded, required under WAC 317-21-205(1), and the comprehensive written voyage plan required under WAC 317-21-205(2) may not be erased, discarded, or altered without permission of the office.

[Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-225, filed 12/9/94, effective 6/7/95.]

WAC 317-21-230 Personnel policies — Training. An oil spill prevention plan for a tanker must describe a comprehensive training program that requires training beyond the training necessary to obtain a license or merchant marine document. The program must include instruction on the use of job-specific equipment, installed technology, lifesaving equipment and procedures, and oil spill prevention and response equipment and procedures. The program must at a minimum contain the following elements.

(1) *Crew training.* Within three years from the effective date of this chapter or from the date of employment by the owner or operator, whichever is later, a crew member shall complete a comprehensive training program approved by the office.

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(2) *Vessel orientation.* Personnel newly assigned to a tanker or who have not served on another tanker of the same vessel type for more than one year, and maintenance personnel who sail on tankers, shall undergo an orientation that includes:

(a) Station assignments and procedures under WAC 317-21-220; and

(b) A vessel familiarization tour that includes:

(i) A walking tour of the deck house and other spaces designated by the vessel master; and

(ii) Identification of all egress routes.

(3) *Position specific requirements.* All personnel newly hired or who have not served on a tanker of the same vessel type for more than one year, and who are filling positions designated on the vessel's certificate of inspection issued by the U.S. Coast Guard or safe manning certificate issued by the vessel's nation of registry, shall complete training specific to their position.

(a) The vessel's master, chief mate, chief engineer, and senior assistant engineer shall be trained in shipboard management.

(b) The vessel's master and other licensed deck officers shall be trained in:

(i) Bridge resource management;

(ii) Automated radar plotting aids;

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(iii) Shiphandling;

(iv) Crude oil washing, if the vessel is so equipped;

(v) Inert gas systems, if the vessel is so equipped;

(vi) Cargo handling for all cargo types carried, including associated hazards with each type, and hull stress during cargo transfer;

(vii) Oil spill prevention and response responsibilities;
and

(viii) Shipboard fire fighting.

(c) The vessel's licensed engineering officers shall be trained in:

(i) Inert gas systems, if the vessel is so equipped;

(ii) Vapor recovery systems, if the vessel is so equipped;

(iii) Crude oil washing, if the vessel is so equipped;

(iv) Oil spill prevention and response responsibilities;
and

(v) Shipboard fire fighting.

(d) Unlicensed ratings shall be trained in bridge resource management if assigned bridge responsibilities, or in cargo handling if assigned cargo handling responsibilities, or both,

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and all ratings shall receive training in oil spill prevention and response, and shipboard fire fighting.

(4) *Refresher training.* Personnel who received training described in subsection (3) of this section shall undergo refresher training at least once every five years. Refresher training must include examination of the crew member's skills to determine his or her ability to safely and effectively perform in the position assigned. Personnel who fail to undergo refresher training within five years, shall complete the position specific training program required in subsection (3) of this section.

(5) *Shipboard drills.* The following shipboard drills must be conducted and logged in the vessel's deck log.

(a) A weekly fire drill that meets the requirements of 46 C.F.R. sec. 35.10-5.

(b) A monthly abandon ship drill that meets the requirements of the International Convention on Safety of Life at Sea, Chapter III, Part B, Regulation 18.

(c) The following drills must be conducted quarterly:

(i) Oil spill response;

(ii) Emergency steering that complies with the International Convention of Safety of Life at Sea, Chapter V, Regulation 19-2(d);

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- (iii) Loss of propulsion;
- (iv) Loss of electrical power;
- (v) Emergency towing; and
- (vi) Man overboard.

[Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-230, filed 12/9/94, effective 6/7/95.]

WAC 317-21-235 Personnel policies — Illicit drug and alcohol use. (1) An owner or operator of a tanker shall have policies, procedures, and practices for alcohol and drug testing that comply with 33 CFR Part 95 and 46 CFR Parts 4 and 16, except 46 CFR sec. 16.500. The owner's and operator's policies, procedures, and practices shall ensure that:

(a) A person neither consumes, nor is under the influence of, alcohol on a tanker while in state waters unless that person is a passenger who does not perform, and will not perform, any duty on the tanker in state waters; and

(b) A person neither consumes, nor is under the influence of, illicit drugs on a tanker while in state waters.

(2) State-licensed pilots are subject to the alcohol and illicit drug chemical testing policies established by the state board of pilotage commissioners and are not required to comply with the testing program developed to meet the standards described in this section.

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(3) The testing program must include tests for alcohol and drug use that meet the following objectives:

(a) A person is not employed who is likely to consume illicit drugs or consume alcohol while on a tanker in state waters;

(b) Chemical tests for evidence of alcohol or drug use, or both, are taken from all crew members who may have been directly involved as soon as practicable after an allision, collision, grounding, ship board fire, flood, or discharge of oil or hazardous material; and

(c) A person on a tanker is tested for illicit drug or alcohol use, or both, when there is reasonable cause to believe the person is under the influence of alcohol or illicit drugs; and

(d) All personnel are randomly chemically tested for being under the influence of illicit drugs or alcohol.

(4) The owner or operator shall describe measures employed to ensure quality control of all test samples taken and the accuracy of test results.

(5) The owner or operator shall submit a report with annual plan updates required under WAC 317-21-530. The report must describe testing activity and results for the past calendar year. The report must include:

(a) The total number of personnel covered by the owner or operator's plan during the past year;

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(b) The total number of personnel tested for illicit drugs in the past year;

(c) The total number of personnel tested for alcohol in the past year; and

(d) A numerical summary of the testing performed and positive test results by ratings and assigned vessel.

(6) The owner or operator shall report to the office the name, rating and assigned vessel of any navigation or engineering watchstander who remains employed by the owner or operator as a watchstander after testing positive more than once during the previous twelve months of employment for illicit drugs or use of alcohol on a tanker. The report shall be made within seventy-two hours of confirmation of the positive test result.

(7) For the purposes of this section, the following definitions apply.

(a) "Chemical test" means an analysis of a person's breath, blood, urine, saliva, bodily fluids, or tissues for evidence of illicit drug or alcohol use performed in a scientifically recognized manner.

(b) "Illicit drug" means a narcotic drug, controlled substance or a controlled substance analog as defined under 21 U.S.C. sec. 802 that the U.S. Coast Guard has approved for testing under 49 CFR Part 40, and for which the U.S. Department of Health and Human Services has established an approved testing protocol and positive threshold.

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(c) "Positive test results" means a chemical test that identifies any amount of alcohol or levels of illicit drugs meeting or exceeding initial cut off levels described in 49 CFR sec. 40.29(e) found as a result of chemically testing a person's breath, blood, urine, saliva, bodily fluids, or tissues.

(d) "Random chemically tested" means that each crew member of a vessel covered by a prevention plan has a substantially equal chance of selection on a statistically valid basis throughout the crew member's employment, as long as the number of vessel personnel tested annually equals the U.S. Coast Guard's annual rate for random drug testing under 46 CFR sec. 16.230. Random testing may not include pre-employment, post-accident, reasonable cause tests, or tests required to maintain a mariner's license or documentation. Random testing also may not include tests required by a marine facility.

(e) "Reasonable cause" means a reasonable belief that a person has used an illicit drug or alcohol based on either direct observation of actual use or of specific, contemporaneous physical, behavioral, or performance indicators of probable use.

(f) "Under the influence" means either the effects of consuming alcohol or illicit drugs is apparent by observation of the person's manner, disposition, speech, muscular movement, general appearance or behavior, or the person has a positive test result. A person is presumed to be under the influence if observed to consume any alcohol or drugs other than recommended dosages of prescribed or nonprescribed medications.

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(8) If one percent or less of the personnel covered by an owner's or operator's plan have positive test results for two consecutive calendar years, the owner or operator may reduce the level of random testing to twenty-five percent of covered personnel. Positive test results from post-accident, reasonable cause, and random testing are included in the calculation of the one percent. If more than one percent of the covered personnel have positive test results for two consecutive years, the office may require:

(a) Preboarding alcohol testing for all personnel;

(b) Unannounced, random alcohol testing of personnel while the vessel is in state waters; or

(c) Both.

[Statutory Authority: RCW 88.46.040. 96-03-070, § 317-21-235, filed 1/17/96, effective 2/17/96. Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-235, filed 12/9/94, effective 6/7/95.]

WAC 317-21-240 Personnel policies — Personnel evaluation. An oil spill prevention plan for a tanker must contain policies, procedures, and practices that describe a program for evaluating members of a vessel's crew. The program must include the following elements.

(1) The vessel master, chief engineer, and officers shall monitor the fitness for duty of crew members. A crew member determined to be unfit for duty shall be immediately relieved of duties.

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(2) Crew members with a contractual obligation to serve on vessels covered by the prevention plan for more than six months shall undergo a performance review at least annually that provides a job performance evaluation and identifies any training needed to safely and effectively perform his or her assigned duties.

[Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-240, filed 12/9/94, effective 6/7/95.]

WAC 317-21-245 Personnel policies — Work hours.

(1) A member of a tanker's crew may not work more than fifteen hours in twenty-four hours, nor more than thirty-six hours in seventy-two hours except in an emergency. Time spent performing administrative duties is considered time worked. Time spent participating in ship board drills is not considered time worked if participation is required by the master, company policy, or law or regulation.

(2) An emergency is an unforeseen situation that poses an imminent threat to human safety or the environment, or substantial loss of property.

(3) A licensed deck officer may not assume duties on a navigation watch when first departing a berth in state waters unless he or she was off duty for at least six hours of the twelve hours prior to departure.

[Statutory Authority: RCW 88.46.040. 96-03-070, § 317-21-245, filed 1/17/96, effective 2/17/96. Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-245, filed 12/9/94, effective 6/7/95.]

*Appendix J***WAC 317-21-250 Personnel policies — Language.**

An oil spill prevention plan for a tanker must demonstrate that:

(1) All licensed deck officers and the vessel's designated person in charge under 33 CFR sec. 155.700 are proficient in English and speak a language understood and spoken by subordinate officers and unlicensed crew; and

(2) All operating manuals, directives, written instructions, placards and station bills are printed in a language understood and spoken by both the vessel's licensed officers and unlicensed crew.

[Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-250, filed 12/9/94, effective 6/7/95.]

WAC 317-21-255 Personnel policies — Record keeping. The owner or operator shall maintain the following records:

(1) *Training records.* The owner or operator shall maintain detailed training records for personnel assigned to each vessel covered by the plan. The records must include training required to obtain a license or merchant marine document, and completion dates and performance evaluations of the training described in WAC 317-21-230 (2) through (4). Personnel training records must be maintained either on the vessel where the person is assigned or at a central location. If the owner or operator maintains personnel training records at a central location, the owner or operator shall:

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(a) Provide the office the address where the records are kept and name of the custodian of the records; and

(b) Provide the office requested records within seventy-two hours of receiving a request for the record.

(2) *Work hour records.* The owner or operator shall ensure that compliance with WAC 317-21-245 is documented and, upon request, shall provide the documentation to the office.

[Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-255, filed 12/9/94, effective 6/7/95.]

WAC 317-21-260 Management. (1) *Management oversight.* Owners and operators of a tanker shall have management policies, procedures, and practices that demonstrate active monitoring of vessel operations and maintenance, personnel training and development, personnel health and fitness for duty, technological improvements in navigation and cargo handling, and management practices. Active monitoring includes identification of problems in these areas and implementation of corrective measures.

(2) *Management program.* Subject to subsection (3) of this section, the management program must meet the certification requirements of:

(a) The International Ship Managers Association for complying with the Code of Ship-Management Standards;

(b) Det Norske Veritas for complying with the Safety/Environmental Protection management system;

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(c) Lloyd's Register for complying with the Quality Management System; or

(d) The vessel's nation of registry for complying with the International Maritime Organization's International Safety Management Code.

(3) *Management program elements.* An owner or operator without a certified management program under subsection (2) of this section, shall have a management program containing the following elements.

(a) Policy statement. A company policy statement, signed by the company's chief executive officer, committing the company, management, employees, and agents to:

(i) Personal safety; and

(ii) Prevention of environmental pollution.

(b) Organization. An organizational scheme that includes:

(i) Clear lines of authority and communication for safety, quality assurance, and environmental pollution prevention for both the vessel and shore-side management;

(ii) Shipboard safety meetings at least weekly;

(iii) An accident prevention program for recognizing, evaluating, and reducing accidents that result in personal injury or reduction of quality assurance, or both; and

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(iv) A program for responding to environmental pollution or events, or both, that provides reporting guidelines, investigation procedures, and a process for determining and implementing corrective measures.

(c) Performance measurement. A program to measure the performance of management, employees, and agents in meeting the goals stated in the company's policy statement. The program must include a system of internal audits by the company and external audits by an independent auditor.

(4) *Vessel visitation*. An owner or operator of a tanker shall have a vessel visitation program that requires quarterly visits by company management such as port captains or port engineers to each tanker covered by the plan in active service. During these visits, company managers shall review shipboard management and operations with the vessel master and chief engineer, and provide guidance in correcting identified problem areas. The vessel's master shall record the time, date, and findings in the deck log.

(5) *Preventive maintenance*. An oil spill prevention plan for a tanker must describe a comprehensive maintenance program that includes, at a minimum, the following elements.

(a) Planned maintenance. A planned maintenance program for a vessel's navigation, propulsion, steering, communications, electrical, and cargo handling systems that involves at a minimum:

(i) Preventive maintenance for each system according to the procedures and recommended frequency of the machine's or equipment's manufacturer;

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(ii) Annual inspections of each system; and

(iii) Inventory control and maintenance of necessary replacement parts.

(b) Critical area inspection plans. A plan to monitor and repair the structural integrity of critical areas of the vessel's holds, piping, and hull identified by historical information or predictive models, or both. Critical areas must be visually inspected annually, and thickness gauged where structural integrity is questioned. Corrosion reduction measures must be identified and scheduled.

(c) Documentation. Surveys of the holds, piping, and hull by the vessel's classification society, and annual inspections or surveys by any other independent entity, must be documented and any reports generated retained on board.

[Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-260, filed 12/9/94, effective 6/7/95.]

WAC 317-21-265 Technology. (1) *Navigation equipment*. An oil spill prevention plan for a tank vessel must describe navigation equipment used on a vessel covered by the plan which includes:

(a) Global positioning system (GPS) receivers; and

(b) Two separate radar systems, one of which is equipped with an automated radar plotting aid (ARPA).

(2) *Emergency towing system*. Tankers must be equipped with an emergency towing system on both the bow

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and stern within two years from the effective date of this chapter. The emergency towing system comprises:

(a) Designated strong points able to withstand the load to which they may be subjected during a towing operation in maximum sustained winds of forty knots and sea or swell heights of five and a half meters (18 feet);

(b) Appropriate chafing chains, towing pennant, tow line and connections of a size and strength to tow the tanker fully laden in maximum sustained winds of forty knots and sea or swell heights of five and a half meters (18 feet); and

(c) Appropriately sized and colored marker buoys attached to the towing pennants.

(2) The emergency towing system must be deployable:

(i) In 15 minutes or less by at most two crew members;

(ii) From the bridge or other safe location when the release points are inaccessible; and

(iii) Without use of the vessel's electrical power.

[Statutory Authority: RCW 88.46.040. 96-03-070, § 317-21-265, filed 1/17/96, effective 2/17/96. Statutory Authority: RCW 43.211.030 and 88.46.040. 95-01-029, § 317-21-265, filed 12/9/94, effective 6/7/95.]

* * * *

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Wash. Rev. Code Ann. § 88.46.040 (1999)

§ 88.46.040. Prevention plans

(1) The owner or operator for each tank vessel shall prepare and submit to the office an oil spill prevention plan in conformance with the requirements of this chapter. The plans shall be submitted to the office in the time and manner directed by the office, but not later than January 1, 1993. The spill prevention plan may be consolidated with a spill contingency plan submitted pursuant to RCW 88.46.060. The office may accept plans prepared to comply with other state or federal law as spill prevention plans to the extent those plans comply with the requirements of this chapter. The office, by rule, shall establish standards for spill prevention plans. The rules shall be adopted not later than July 1, 1992.

(2) The spill prevention plan for a tank vessel or a fleet of tank vessels operated by the same operator shall:

(a) Establish compliance with the federal oil pollution act of 1990 and state and federal financial responsibility requirements, if applicable;

(b) State all discharges of oil of more than twenty-five barrels from the vessel within the prior five years and what measures have been taken to prevent a reoccurrence;

(c) Describe all accidents, collisions, groundings, and near miss incidents in which the vessel has been involved in the prior five years, analyze the causes, and state the measures that have been taken to prevent a reoccurrence;

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(d) Describe the vessel operations with respect to staffing standards;

(e) Describe the vessel inspection program carried out by the owner or operator of the vessel;

(f) Describe the training given to vessel crews with respect to spill prevention;

(g) Establish compliance with federal drug and alcohol programs;

(h) Describe all spill prevention technology that has been incorporated into the vessel;

(i) Describe the procedures used by the vessel owner or operator to ensure English language proficiency of at least one bridge officer while on duty in waters of the state;

(j) Describe relevant prevention measures incorporated in any applicable regional marine spill safety plan that have not been adopted and the reasons for that decision; and

(k) Include any other information reasonably necessary to carry out the purposes of this chapter required by rules adopted by the office.

(3) The office shall only approve a prevention plan if it provides the best achievable protection from damages caused by the discharge of oil into the waters of the state and if it

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determines that the plan meets the requirements of this section and rules adopted by the office.

(4) Upon approval of a prevention plan, the office shall provide to the person submitting the plan a statement indicating that the plan has been approved, the vessels covered by the plan, and other information the office determines should be included.

(5) The approval of a prevention plan shall be valid for five years. An owner or operator of a tank vessel shall notify the office in writing immediately of any significant change of which it is aware affecting its prevention plan, including changes in any factor set forth in this section or in rules adopted by the office. The office may require the owner or operator to update a prevention plan as a result of these changes.

(6) The office by rule shall require prevention plans to be reviewed, updated, if necessary, and resubmitted to the office at least once every five years.

(7) Approval of a prevention plan by the office does not constitute an express assurance regarding the adequacy of the plan nor constitute a defense to liability imposed under this chapter or other state law.

(3) This section does not authorize the office to modify the terms of a collective bargaining agreement.

HISTORY: 1991 c 200 § 417.

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APPENDIX K — COMPARISON OF BAP REGULATIONS TO CORRESPONDING FEDERAL LAW

	WAC BAP REGULATIONS	FEDERAL STATUTES	FEDERAL REGULATIONS	INTERNATIONAL AGREEMENTS
A	317-21-130 Event Reporting Requires reporting of all collisions, allisions, and near-miss incidents.	33 USC 1906 46 USC 6101	33 CFR 151.15 33 CFR 153.201 et seq. 33 CFR 155.1030 33 CFR 156.220 33 CFR 164.61 46 CFR 4.04, 4.05 46 CFR 35.15	MARPOL Protocol I Article 8
B	317-21-200(1) Navigation Watch Requires three licensed officers on bridge during restricted visibility.	46 USC 3703(a)(4) 46 USC 8101, 8104 46 USC 8301 46 USC 8502(h) 46 USC 9101, 9102 33 USC 1231, 1602	33 CFR 164.13(c) 33 CFR 81, App. A, Rules 5 & 19 46 CFR 15.850	STCW.6/Circ.1 Rule 5 & 19, COLREGS SOLAS, chs. V (Reg. 13) STCW ch. VIII, Parts 3-1, 4-1, & 4-3
C	317-21-200(2) Bridge Resource Management Requires fleet-wide system which organizes responsibilities and coordinates communication between members of bridge.	46 USC 3703(a)(4) 46 USC 9101, 9102	33 CFR 168.60	STCW.6/Circ.1 STCW, ch. II
D	317-21-200(3) Coordination with Pilots Requires that Bridge Resource Management system include provisions to coordinate interaction between bridge and pilots.	46 USC 3703(a)(4)	33 CFR 168.60 33 CFR 164.11	STCW.6/Circ.1 STCW, ch. VIII, Part 3-1

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	WAC BAP REGULATIONS	FEDERAL STATUTES	FEDERAL REGULATIONS	INTERNATIONAL AGREEMENTS
E	317-21-200(4) Security Rounds Requires security rounds every two hours or once per watch.	46 USC 3703(a)(4)		STCW.6/Circ.1 STCW, ch. VIII, Part 3-1, Part 4-3
F	317-21-200(5) Anchor Watch Requires continuous anchor watch.	46 USC 3703(a)(4)	33 CFR 164.19	STCW.6/Circ.1 STCW, ch. VIII, Part 3-1
G	317-21-200(6) Engineering Watch Requires presence of licensed engineer in engineering control room and machinery spaces when ship is maneuvering.	46 USC 3703(a)(4)	33 CFR 164.13(b)	STCW.6/Circ.1 STCW, ch. VIII, Parts 3-2, 4-2, & 4-4
H	317-21-205(1) Fix Intervals Requires that position be recorded every 15 minutes.	46 USC 3703(a)(4)	33 CFR 164.11	STCW.6/Circ.1 STCW, ch. VIII, Part 3-1
I	317-21-205(2) Voyage Planning Requires that comprehensive voyage plan be written before entering state waters.	46 USC 3703(a)(4)	46 CFR 35.20 33 CFR 168.60	STCW.6/Circ.1 STCW, ch. VIII, Part 2
J	317-21-205(3) Compass Checks Requires frequent compass checks while underway.	46 USC 3703(a)(4)	33 CFR 164.11(i)	STCW.6/Circ.1 STCW, ch. VIII, Part 3-1

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	WAC BAP REGULATIONS	FEDERAL STATUTES	FEDERAL REGULATIONS	INTERNATIONAL AGREEMENTS
K	317-21-210 Engineering Requires adherence to specified engineering and monitoring practices.	46 USC 3703(a)(1) 46 USC 3703(a)(4) 46 USC 3707	33 CFR 164.11(s), (t) 33 CFR 164.25 46 CFR 35.10-15 46 CFR 35.20-10, 58.25	SOLAS, ch. II-1, pt. D, Reg. 41, 43, 44 SOLAS, ch. V, Reg. 19-1, 19-2 STCW, ch. VIII, pt. 3-2
L	317-21-215 Pre-Arrival Tests and Inspections Requires inspection and testing of engineering, navigation, and propulsion systems prior to entering or leaving state waters.		33 CFR 164.25 46 CFR 35.20	SOLAS, ch. V, Reg. 19-2 STCW, ch. VIII, pt. 3-1
M	317-21-220 Emergency Procedures Requires posting of crew assignments and procedures for shipboard emergencies.		33 CFR 151.26 33 CFR 155.1035 46 CFR 35.10	MARPOL, Annex I, ch. IV, Reg. 26 SOLAS, ch. III, Reg. 8, 9, 53
N	317-21-225 Events Requires operator to retain position plotting records and comprehensive written voyage plan after occurrence of collision, allision, or near-miss incident.		46 CFR 4.05-15 33 CFR 164.61 46 CFR 35.15-1	
O	317-21-230 Training Requires comprehensive training program beyond licensing or merchant marine documentation.	46 USC 3703, 7101, 7302(a), 7317(a), 7315, 9101, 9102 46 USC 8304	46 CFR 35.10-5 46 CFR 10, 12, 13, 15, 30.30 46 CFR 39.10-11 33 CFR 155.710, 155.1055, 155.1060	STCW.6/Circ.1 STCW, ch. II, III, V, VI OCC, 1936 SOLAS, ch. III, Reg. 18; ch. V, Reg. 19-2

	WAC BAP REGULATIONS	FEDERAL STATUTES	FEDERAL REGULATIONS	INTERNATIONAL AGREEMENTS
P	317-21-235 Illicit Drug and Alcohol Use Requires drug testing and reporting.	46 USC 6101(b), 7101(i), 7302(e), 7701(b), 7703, 7704	33 CFR 95 46 CFR 4, 16, 35.05-25	
Q	317-21-240 Personnel Evaluation Requires monitoring of fitness for duty of crew and annual performance and safety evaluation.	46 USC 3703(a)(5), 7302(a), 7317(a), 7315, 9101, 9102	46 CFR 4, 5, 10, 12, 13, 15, 16, 30	STCW, chs. II, III, V, VI
R	317-21-245 Work Hours Imposes maximum working hours.	46 USC 8104	46 CFR 15.705, .710	STCW.6/Circ.1 STCW, ch. VIII, Section A-VIII/1
S	317-21-250 Language Requires all deck officers and vessel master to be proficient in English, and be able to speak a language understood by subordinate officers and unlicensed crew.	46 USC 8702(b)	33 CFR 155.710 46 CFR 15.730	STCW, ch. II, III
T	317-21-255 Recordkeeping Requires retention of crew training records.	46 USC chs. 113 46 USC pt. E, 9101, 9102	33 CFR 155.710 46 CFR 10, 12, 13, 30.30, 39.10-11	STCW, ch. II, IV, V, VI

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	WAC BAP REGULATIONS	FEDERAL STATUTES	FEDERAL REGULATIONS	INTERNATIONAL AGREEMENTS
U	317-21-260 Management Requires management practices that demonstrate active monitoring of vessel operations and maintenance.	46 U.S.C. ch. 32		SOLAS ch. IX, Reg. 2 SOLAS, ch. IX
V	317-21-265 Technology Requires certain equipment, including global positioning system, two radar systems, and emergency towing systems.	33 USC 1223(a)(3) 46 USC 3708	33 CFR 155.235(a) 33 CFR 164.35, .37, .38, .41, .43 46 C.F.R. 2.15-30	SOLAS, ch. V, Reg. 12 SOLAS, chs. V, Reg. 15-1
W	317-21-540 Advance Notice of Entry and Safety Report Requires 24-hours advance notice of entry into state waters, and disclosure of any conditions that pose hazards to the vessel or marine environment.	33 USC 1223(a)(5)	33 CFR 156.215 33 CFR 160.201 et seq. 33 CFR 161	SOLAS, ch. V
X	RCW 88-46-040 Prevention Plans	46 USC 2103 46 USC 3703 46 USC 3710, 3711 46 USC 9101 46 USC 9102		SOLAS, chs. I, Reg. 17 MARPOL 73/78 Art. 5, 7 STWC, ch. I, Sec. A-I/4 Officer Competency Convention, 1936 (46 USC 8304)

**APPENDIX L — NOTE VERBALE OF THE ROYAL
DANISH EMBASSY, WASHINGTON, D.C.
DATED JUNE 14, 1996**

**ROYAL DANISH EMBASSY
WASHINGTON, D. C.**

File No. 60.USA.1/4

NOTE VERBALE

The Governments of Belgium, Denmark, Finland, France, Germany, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Spain, Sweden and the Commission of the European Community (hereinafter referred to as "the Governments") present their compliments to the Department of State and have the honour to refer to legislation introduced by the State of Washington to regulate tanker personnel, equipment and operations.

The Governments believe that the regulation of tanker personnel, equipment and operations should be considered and established internationally in the appropriate fora such as the IMO and the ILO.

The Governments are concerned that legislation by the State of Washington on tanker personnel, equipment and operations would cause inconsistency between the regulatory regime of the US Government and that of an individual State of the US. Differing regimes in different parts of the US would create uncertainty and confusion. This would also set an unwelcome precedent for other Federally administered countries.

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The Governments therefore urge the US to pursue a regulatory regime, on a national basis, which is consistent with agreed international standards.

The Governments avail themselves of this opportunity to renew to the Department of State their assurance of their highest consideration.

Washington, D.C.
June 14, 1996

[seal]
ROYAL DANISH EMBASSY,
WASHINGTON, D.C.

